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THE SUPREME COURT'S INTERPRETATION OF THE GUARANTEE OF FREEDOM OF SPEECH

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"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[1] These few words from the first amendment have given rise to reams of commentary and a multitude of views from the Supreme Court. The spectacle of the Court applying the first amendment is reminiscent of the fable of the blind men of Indostan describing an elephant.[2] Grabbing a leg, the Court proclaims that the amendment is violated if speech is abridged without a "clear and present danger."[3] Touching the trunk, "knowing falsehoods"[4] are stated to be outside its scope. Feeling the tusks, the Court discusses "fighting words."[5] Straddling the shoulders, the Court says violations are ascertained by "balancing."[6] Seizing the tail, the Court announces "commercial speech."[7] Other organs cause the Court to perceive a "predominant appeal to the prurient interest."[8] Still other parts of the elephant's body result in discussion of "vagueness,"[9] "overbreadth,"[10] "narrow construction of delegated powers,"[11] "narrow construction of statutes,"[12] "prior

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1. U.S. CONST. amend. I.
2. Saxe, *The Blind Men and the Elephant* in DICTIONARY OF QUOTATIONS 195 (B. Evans ed. 1968).
3. Schenck v. United States, 249 U.S. 47 (1919).
4. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
5. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
6. American Communications Ass'n v. Douds, 339 U.S. 382 (1950).
7. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942).
8. *See* Roth v. United States, 354 U.S. 476 (1957).
9. *See* Stromberg v. California, 283 U.S. 359 (1931).
10. *See* Coates v. Cincinnati, 402 U.S. 611 (1971).
11. *See* Kent v. Dulles, 357 U.S. 116 (1958).
12. *See* NLRB v. Fruit & Vegetable Packers & Warehousemen, 377 U.S. 58 (1964).

restraint,"[13] "preemption,"[14] and even "equal protection."[15] This panoply of verbiage[16] has led some critics to conclude that "the Supreme

13. *See* Near v. Minnesota, 283 U.S. 697 (1931).

14. *See* Pennsylvania v. Nelson, 350 U.S. 497 (1956).

15. Chicago Police Dep't v. Mosley, 408 U.S. 92 (1972).

16. Another term frequently used is "preferred position." Strictly speaking, however, this is not a "test." It is a shorthand way of referring to all the other tests and auxiliary doctrines which apply when expression is threatened but which are not invoked when non-speech liberties are restricted. *See* McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182 (1959).

In one sense, the "preferred position" of speech is obvious, in that a prohibition on the abridgement of "freedom of speech" by Congress is explicitly stated in the Constitution. Furthermore, although the exact meaning of "freedom of speech" may be debatable, there is no specific mention of "reasonableness" to temper the prohibition on its abridgement as there is on searches and seizures under the fourth amendment. Significantly, the same tests used to protect speech under the first amendment are also invoked against the states through the fourteenth amendment which contains no such explicit language. The first case applying the standards of the first amendment to the states through the fourteenth did so without analysis. Gitlow v. New York, 268 U.S. 652 (1925). Justice Brandeis, concurring in Whitney v. California, 274 U.S. 357 (1927), suggested that he thought the due process clause of the fourteenth amendment applied only to procedure and not to substance, but noted that he would abide by the Court's decision to treat freedom of speech as protected under that amendment.

Nevertheless, there are reasons for singling out freedom of expression as deserving more than mere procedural protection under the fourteenth amendment. First, certain procedural rights such as confrontation, assistance of counsel and trial by jury are explicitly guaranteed by the Constitution in the sixth and seventh amendments. This suggests the words "due process" in the fifth and fourteenth amendments include guarantees stated elsewhere in the Constitution.

Once it is determined that the phrase "due process" includes other constitutional guarantees, it may be argued that the process which is due a person is governmental action which respects the limits on governmental power stated in the Constitution. Thus Justice Black argued that the due process clause together with the privileges and immunities clause is a shorthand form of referring to all the specific guarantees of the Bill of Rights This view finds some support in the language of the framers of the fourteenth amendment who were anxious to prevent a recurrence of the prohibition on abolitionist speech which existed in the South prior to the Civil War. *See* Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting). *But see* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights: The Original Understanding*, 2 STAN. L. REV. 5 (1949).

Even those judges who disagree with Black's theory of incorporation have regarded freedom of speech as indispensable to "fairness" in our legal system and thus part of "due process." "Of that freedom [thought and speech] one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." Palko v. Connecticut, 302 U.S. 319, 327 (1937). Thus a law which is the result of a process that prevents dissent *is itself defective.* And the law which forbids the expression of particular sentiments by its very terms prevents dissenting arguments which contain those expressions. Even in Canada, which has no explicit constitutional guarantee of free speech, Justice Rand found such a guarantee implied in the establishment of an elected government.

> Government is by parliamentary institutions, including popular assemblies elected by the people at large in both Provinces and Dominion: Government resting

Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases."[17] Nevertheless, by understanding the context in which the Court has used each test a picture of the elephant may be constructed.

"The essence of this forbidden censorship is content control."[18] The government may not penalize speech because it is opposed to the ideas expressed. This does not mean that the government may never suppress speech; it merely means that any suppression of speech must be merely an incidental effect of legislation serving some other legitimate end. Suppression of ideas is not a legitimate governmental purpose. The corollary to this principle is that in achieving a governmental purpose other than suppression of ideas, the government must use the means which are least restrictive of expression.[19] The Court formulated this proposition in deciding *United States v. O'Brien*:[20]

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

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ultimately on public opinion reached by discussion and the interplay of ideas. If that discussion is placed under license, its basic condition is destroyed: the Government, as licensor, becomes disjoined from the citizenry.

Saumur v. Quebec, [1953] 4 D.L.R. 641, 671.

17. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 15 (1970) [hereinafter cited as EMERSON]. Although numerous commentators, like Emerson, have stated their own theory of the first amendment, few have articulated the Court's view.

18. Chicago Police Dep't v. Mosley, 408 U.S. 92, 96 (1972). The Court continued, "Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.' New York Times Co. v. Sullivan . . . ." *Id.*

19. If the same goal may be achieved by use of means less restrictive of speech, the use of the more restrictive means indicates a design to suppress the idea as well as accomplish other goals. *See* Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254, 287 (1964); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969). An analogy may be drawn to the "least restrictive alternative" doctrine used in deciding whether a state law is invalid under the commerce clause. *See* Dean Milk Co. v. Madison, 340 U.S. 349 (1951). An obvious difficulty in the application of this doctrine is that judges will differ on the adequacy of alternative means as regards both mitigating restrictions on speech and securing the government's legislative goals.

20. 391 U.S. 367, 377 (1968).

Each of the tests used by the Court in free speech cases is an application of the preceding principles to different situations. The "clear and present danger" test is a standard for determining whether the speech restriction is essential to furthering the legitimate purposes of orderly government. The concept of unprotected speech with its various tests — "fighting words," "predominant appeal to the prurient interest," and "knowing falsehoods" — is utilized to determine whether the governmental interest is the suppression of something other than free expression. Finally, the "balancing" test and the ancillary doctrines of "prior restraint," "overbreadth," "vagueness," "preemption," "narrow construction," "improper delegation" and "equal protection" all look to both the substantiality of the governmental interest and the essentiality of the restriction on first amendment freedoms.[21]

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21. The doctrine of "prior restraint" is best viewed as an adjunct to the "clear and present danger" test and the tests for "unprotected speech" in contexts where additional concern is necessary. For example, where it appears probable to the legislature prior to the delivery of a speech that delivery will present a "clear and present danger" of very grave harm, the legislature might seek to prevent delivery. Since the legislative judgment, being before the fact, is at best speculative, the Supreme Court demands a higher degree and greater certainty of harm than in the typical "clear and present danger" situation before permitting any "prior restraint." *See, e.g.,* New York Times Co. v. United States, 403 U.S. 713 (1971). Where the prior restraint is on "unprotected speech" like obscenity, libel or fighting words, the concern is that some protected material may be unnecessarily suppressed. Thus, the doctrine requires judicial determination of the nature of the material within "the shortest fixed period compatible with sound judicial resolution" and puts the burden on those wishing to suppress the speech to demonstrate its unprotected nature. Freedman v. Maryland, 380 U.S. 52, 59 (1965).

Other ancillary doctrines also make certain that the legislature is directing the statute at a non-speech evil. Courts will construe statutes narrowly to avoid constitutional questions. *See* Ashwander v. TVA, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). One manifestation of this principle is the narrow construction of delegated authority in first amendment cases. *See* Schneider v. Smith, 390 U.S. 17 (1968). Decisions such as these force the legislature to articulate the reasons why its legislation may incidentally infringe on speech and thereby assure that the legislation serves a legitimate purpose without unnecessarily (here unintentionally or without deliberate consideration) affecting speech.

Another ancillary doctrine the Court applies is "pre-emption" whereby the existence of federal law in certain areas is considered to limit or prevent the application of state law in those areas. The state's purpose is no longer within the state's power unless achieved in a manner consonant with the federal law. For example, in Linn v. Plant Guard Workers, 383 U.S. 53, 61 (1966), the Court recognized an "'overriding state interest' in protecting [state] residents from malicious libels." But the Court held that in the area of labor disputes governed by the National Labor Relations Act, federal policy is to allow uninhibited, robust, and wide-open debate and as such requires application of the New York Times Co. v. Sullivan, 376 U.S. 254 (1964), standard to any alleged libel of participants in such disputes. 383 U.S. at 58–62. *See* National Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 270–73 (1974). Thus the state may still permit libel actions arising from these disputes, but only

While all the tests which the Court uses to ascertain whether the first amendment has been violated may be seen as an implementation of the language quoted from *O'Brien,* that does not explain why any narrowly drawn statute which serves a legitimate governmental purpose should be permitted to restrict speech. The justification for the *O'Brien* test is that the words "freedom of speech and of the press" means the right to express oneself without fear of penalty either civil or criminal for the ideas expressed. Particular prosecutions of individuals for reasons other than suppressing ideas will not affect the general freedom of expression where it is clear that the expression of that particular idea is not cause for punishment.[22] Such a reading of the first amendment would seem to re-

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under a standard conforming to the federal law. The *New York Times* case is discussed *infra* at notes 180–88.

Other ancillary doctrines of first amendment interpretation require that the purpose of a statute be achieved with the minimum possible restriction on first amendment freedoms. "Overbroad laws" prohibit more expression than is necessary in order to accomplish the governmental purpose. *See* Note, *The First Amendment Overbreadth Doctrine,* 83 HARV. L. REV. 844 (1970). "Vague" laws are unclear as to their scope and may reach some protected speech. They must be rewritten more precisely to affect only such speech as is essential to accomplish the governmental purpose. *See* Note, *The Void for Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67 (1960). Finally, the Court has begun to invalidate laws that restrict speech on equal protection grounds. Here the failure of a statute forbidding one kind of speech to reach other kinds of speech having the same impact on the asserted governmental interest implies that the interest is not important or substantial enough to warrant any restrictions on speech. *See* Chicago Police Dep't v. Mosley, 408 U.S. 92 (1972).

The final test which the Court says it uses is the "balancing" test. This test is used where the asserted governmental interest in legislation is neither to stop persons from acting on the ideas nor to prevent harm which flows from the ideas themselves. It occurs primarily where the speech is joined to a particular act — symbolic speech, demonstrations, picketing — and the statute is at least nominally directed to the action. *See* Thornhill v. Alabama, 310 U.S. 98, 105 (1940). It may also be applied where speech is used as evidence of an individual's unfitness for a particular position, *see* American Communications Ass'n v. Douds, 339 U.S. 382, 400 (1950) (union official). Another context in which the balancing test is used is governmental attempts to discover information. *See* Watkins v. United States, 354 U.S. 178, 198 (1957); Branzburg v. Hayes, 408 U.S. 665 (1972). In virtually every case, if the Court says it is balancing the interests in speech against the non-speech interests, it will sustain the law restricting speech. This happens because "balancing" generally occurs after the ancillary doctrines of vagueness and overbreadth have been applied. Thus the Court has already concluded that the restriction on free speech is no greater than is essential to further the non-ideational governmental interest. "Balancing" is an inquiry into the importance or substantiality of the governmental interest.

22. *See* Note, *The Speech and Press Clause of the First Amendment as Ordinary Language,* 87 HARV. L. REV. 374 (1973).

quire an inquiry into legislative motivation;[23] however, the Court finds it impossible to construct a constitutional principle on such a

23. A court seeks legislative *intent* in order to interpret and apply a statute. The legislators may have overlooked the specific problem before the court and thus have no relevant intent; they may have considered the problems but thought it preferable to leave the determination of the issues posed for the courts to decide; or they may have had and expressed an idea on how the matter should be resolved. In choosing among these possibilities, the statements of proponents are of particular weight because they are put on record to guide courts in interpreting the statute. Any legislator who disagrees with such statements has an obligation either to vote against the law or to state his opinion that the language has a different meaning. This process, whatever its difficulties, at least creates a body of objective data — the language of the statute, the statements of the legislators and the testimony before the legislative body describing the problem to be solved — from which legislative intent may be ascertained.

Legislative *motivation,* on the other hand, is inherently more subjective. Each legislator votes for a particular bill for his own reasons, reasons which may have nothing to do with how the bill will be interpreted and applied. An economic measure, for example, may be voted for by one legislator because he thinks it will stimulate the economy, by another because he thinks it will help his party, by another because he thinks it will facilitate his re-election. Motivation may be far more subtle and intricate than these examples, of course; furthermore, it may be subconscious so that the legislator himself is unaware of its exact nature. Thus, it is virtually impossible to isolate and identify legislative motivation.

This ephemeral nature of legislative motivation has caused the Court to avoid it consciously. *See* note 24 *infra.* Some commentators have argued, however, that it should be a basis for constitutional decisions in certain cases. In particular, Professor Ely suggests motivation is relevant

> in cases where (1) the governmental choice under attack is not subject from the outset — that is, simply because a choice has been made and someone has been injured by it — to the demand for a legitimate defense ["random choice situations" and "discretionary choice situations" in Ely's terminology] and (2) the group whose disadvantaging is raised by way of objection is one to which the government owes no affirmative duty of accommodation, but simply an obligation of "neutrality."

Ely, *Legislative and Administrative Motivation in Constitutional Law,* 79 YALE L.J. 1205, 1281–82 (1970). To illustrate Ely's approach, consider that the government owes an obligation of racial neutrality. If the legislature passes a law prohibiting blacks from serving on juries, it has violated its obligation of neutrality and created what Ely calls a "disadvantageous distinction." The mere making of the distinction compels the government to justify the law by means of a "legitimate defense." But if the law provided for random jury selection, the government would have made no distinction, and if an all-white jury happened to be impanelled thereunder, the government would have no obligation to defend the selection process *ab initio. Id.* at 1228–35. Ely argues that motivation then becomes relevant, but "only to trigger [the] theretofore inapplicable burden of legitimate defense." *Id.* at 1282. That is, an individual disadvantaged by the selection process may challenge the legislative motivation for employing the process in order to compel a "legitimate defense" by the government. *Id.* at 1228–35.

The foregoing is an example of Ely's random choice situation. An example of the one other area in which he would apply a motivation analysis — the discretionary choice situation — would be the legislature's decision to punish burglary

subjective basis.[24] First, the legislature is composed of many individuals who may act from numerous conflicting or concurrent reasons, but

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more severely than battery. The government need not ordinarily defend such a decision. If it became evident, however, that only blacks committed burglaries and only whites committed batteries, Ely would allow a challenge to the legislative motivation in order "to trigger [the] theretofore inapplicable burden of legitimate defense." *Id.* at 1235–49, 1282.

United States v. O'Brien itself is a case of "disadvantageous distinction" requiring *ab initio* a "legitimate defense" in order to be upheld. Since the need to show a legitimate defense is already triggered by the nature of the case, motivation is irrelevant. In particular, the *O'Brien* Court required the government to show that its law proscribing the destruction of draft cards achieved a substantial goal other than the suppression of anti-war protest, and that such goal could not be as well effectuated by a different law. The required showing appears to meet the necessity for a "legitimate defense." *Id.* at 1282–84.

Because of the clarity and sanctity of the first amendment mandate, the majority of cases raising first amendment problems will be of the "disadvantageous distinction" type; that is, suppression of freedom of expression will typically require a "legitimate defense" from the outset. Inquiry into legislative motivation would therefore generally be inappropriate in first amendment cases in Ely's view.

Professor Brest argues that an illicit motivation should invalidate any law even if the same law could properly be enacted for other reasons. He says that the Court should investigate motivation because it should make sure that the process of adopting the law is proper. Brest, *Palmer v. Thompson: An Approach to the Problems of Unconstitutional Legislative Motive,* 1971 SUP. CT. REV. 95. He admits that it is often difficult to ascertain motivation, *id.* at 120, but would permit invalidation where illicit motivation is shown by "clear and convincing evidence." *Id.* at 130. He acknowledges the problem of *futility* — that a law struck down because enacted from improper motivation could be reenacted with proper motives or with the record effectively concealing the unacceptable motives — and suggests that the law be enjoined unless the decision maker "comes forward with persuasive evidence that this time it will be made only for legitimate reasons." *Id.* at 126. However, he is willing to accept as "persuasive evidence" that "the proposed decision is in fact desirable on the merits and that no practicable alternative is less burdensome to the class at whom the original decision was adversely aimed." *Id. Compare* note 19 *supra.* This approach would make the judge the arbiter of the wisdom of legislation in these cases despite his inherent unsuitability for the task. If, however, the judge were not required to find that the decision "is in fact desirable on the merits," but only that it vindicates important and substantial interests, Brest's test would be the same as that of the *O'Brien* Court, except that the legislation would have been invalidated on the first run through.

Whatever the merits of Professor Brest's arguments for considering motivation, it is obvious that the Court has not accepted his view. *See* note 24 *infra.* Yet, despite its nominal avoidance of motivation, the Court sometimes will invalidate laws where it finds that the abridgement of speech was not "essential" to the governmental interest although "clear and convincing evidence" that it was motivated by a desire to suppress speech would not easily be found. Thus, in some instances, the Court's test may be more effective than Brest's direct inquiry in protecting against improper motivation.

24. Eastland v. United States Serviceman's Fund, 421 U.S. 491 (1975); Palmer v. Thompson, 403 U.S. 217 (1971); United States v. O'Brien, 391 U.S. 367 (1968).

who do not usually explain for the record why they voted as they did. Second, even if motivation could be ascribed to such a body, it could reenact stricken legislation with accompanying statements referring solely to proper motivation. Third, if the Court refused to accept the newly avowed purpose of the legislation as the actual purpose, it would be depriving the legislature of the power to pass a law which the Court itself admits to be within the legislature's power. Consequently, the Court has developed a number of more objective tests which serve to reduce the possibility that the government was motivated by a desire to suppress ideas while permitting acceptable motivations.

It could be argued that the *O'Brien* formulation is itself the Court's conception of the meaning of the first amendment and that motivation for legislation is irrelevant. Focusing on motivation as the underlying concern of the Court, however, helps explain the substance of the phrases "essential" and "substantial"[25] and provides a rational theory

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Cf. White v. Regester, 412 U.S. 755 (1973); Griffin v. County School Bd., 377 U.S. 218 (1964); Gomillion v. Lightfoot, 364 U.S. 339 (1960).

In *O'Brien* the Court made express its reservations about inquiring into legislative motivation. The Court offered several reasons:

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

391 U.S. at 383–84. Professor Ely, *supra* note 23, has drawn from this passage three criticisms of inquiry into motivation which he terms *ascertainability, futility,* and *disutility*. More precisely, these criticisms are that: (1) ascertaining motivation is virtually impossible, (2) voiding for improper motivation a law which could be reenacted from a proper motivation is futile, and (3) voiding for improper motivation a law which achieves a desirable goal is counterproductive.

Professor Brest in his article, *supra* note 23, adds a fourth criticism which he terms *impropriety*. Brest describes *impropriety* as the undesirable intrusion by the courts into the political process, necessarily entailing a lack of respect for the government's chief policy-makers. Brest, *supra* note 23, at 128.

25. The Court has not, in any of these cases, announced that it has examined the motives of the legislature, discerned a nefarious intent, and is striking the law down to frustrate the evil scheme. Doctrines of overbreadth, balancing of interests, or of the "necessary effect" of the statute serve the purpose far more discreetly. What the cases do show, however, is that where the Court perceives a legislative interest in attaining a forbidden end, it may be more critical in its

for how these specific tests may be said to arise from the language of the first amendment.

The government normally proffers a reason other than the suppression of ideas to justify its actions. For each type of justification, the Court has developed a different test or tests to assure that the motivation for the government's act is to punish or prevent some harmful action and not to suppress the idea expressed.[26] Members of the Court may differ on the application of the tests or their exact formulation, but most of the justices perceive their function in the same way.

The remainder of this article discusses the standards used by the Court in determining whether the first amendment has been violated and attempts to show that these standards bear out the thesis just stated. Some readers, conversant with the Court's decisions, may already appreciate the accuracy of the thesis and can profitably skip now to the summary and conclusion. Others, less knowledgeable or more skeptical, may need convincing. For such hard cases, the following is written.

CLEAR AND PRESENT DANGER

> Concerned friend to gourmet standing before an enormous buffet: "Aren't you worried about overeating?" Gourmet: Not at all. For me, the danger is not serious unless it is Gruyere and pheasant."[27]

Some speech incites the listener to take action. This type of speech and concern for the resulting harm gave rise to the earliest Supreme Court cases on free speech. Justice Holmes voiced the dimensions of the problem: "Every idea is an incitement. It offers itself for belief and if believed it is acted upon unless some other belief outweighs it or some failure of energy stifles the movement at its birth."[28] Holmes' response

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evaluation of a legislative declaration that the statute is needed to protect a valid public interest and less likely to permit the asserted interest to be used to sustain the constitutionality of the law.

Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1, 32.

26. Note that the Court does not endeavor, by these tests or otherwise, to ascertain the government's *actual* motivation. Rather, the Court uses these tests to assure that a proper motivation is *possible*. If it is, the Court upholds the law, effectively presuming that the *possible* acceptable motivation is the *actual* motivation, and avoiding the futility problem noted by the *O'Brien* Court and commentators, *supra* notes 23–24. *See also* text following note 35 *infra*.

27. It may be surmised that the lawyer's penchant for atrocious puns was the cause of Dick the Butcher's cry "The first thing we do, let's kill all the lawyers." W. SHAKESPEARE, HENRY VI. PART TWO, Act IV, scene ii. Though Will was wont to pun himself.

28. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting, joined by Brandeis, J.).

to this perception, however, was very different from that of the majority of the Court. In *Gitlow v. New York*,[29] the Court sustained the conviction for "advocacy of criminal anarchy" of a person who published a pamphlet advocating mass political strikes and revolutionary mass action aimed at the annihilation of the parliamentary state. The Court said that freedom of speech "does not protect publications of teachings which *tend* to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties."[30] Since any criticism of governmental actions may *tend* to cause people to resist those measures, the Court's test would permit the government in power to curtail much criticism of its actions. Justice Holmes, with Justice Brandeis, dissented:[31]

> Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

While the government may respond to violent revolution and has a legitimate interest in preventing such violence, the advocacy of such acts serves several important ends in a democratic society. Prohibition of such advocacy may be designed to frustrate those other ends rather than to prevent violence. For example, social criticism is an inevitable concomitant of revolutionary rhetoric — even though the criticism may only amount to a complaint that the speaker personally does not have as much power or wealth as he or she desires. The criticism and the advocacy of revolution cannot be effectively separated since they originate in a common source. If the speaker is thrown into jail to silence his advocacy of revolution, his criticism of society is also silenced. Perhaps the speaker could avoid punishment by giving vent only to social criticism without suggesting revolution to change the situation.[32] While social criticism may be the significant message to society, however, revolution may be the main concern of the speaker. Therefore he or she might be unwilling to engage in criticism without advocacy of

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29. 268 U.S. 652 (1925).

30. *Id.* at 667 (emphasis added).

31. *Id.* at 673.

32. Using the "bad tendency" test of *Gitlow*, however, the speaker might be convicted even here. *See* text at note 30 *supra;* Pierce v. United States, 252 U.S. 239 (1920) (upholding the conviction of three socialists for distributing a pamphlet critical of the war and calling for the adoption of socialism; Holmes & Brandeis, JJ., dissenting).

revolution. Further, in certain instances social criticism may be impossible without also advocating revolution. As a result of societal pressures to accept "orthodox" ideas, opposition may be expressed only by persons whose intensity of feeling leads to the suggestion of radical action.[33] Finally, the idea of revolution itself needs to be discussed and debated. Full acceptance of the idea that change must come only through peaceful and orderly methods requires an examination of the idea of revolution. In fact, our history as a nation began with violent revolution although it was theoretically possible that peaceful discussion might eventually have convinced members of Parliament to end English domination. Alexander Hamilton even used ease of revolution as an argument in favor of the adoption of the Constitution.[34]

> If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government, and which against the usurpations of their national rulers may be exerted with infinitely better prospect of success than against those of the rulers of an individual State.

Holmes and Brandeis saw the value of permitting advocacy of revolution, but thought that the government must be able to protect itself against the occurrence of such a revolution. They resolved this dilemma by creating the "clear and present danger" test:[35]

> To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. . . . [E]ven advocacy of [law] violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.

The Holmes-Brandeis position is consistent with the notion that the government may not attempt to suppress the idea of revolution but may prevent the occurrence of the act. Because legislative motivation cannot adequately be measured, the best assurance that the legislation was aimed at the act and not the idea is a test of necessity. If the act

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33. EMERSON at 9.

34. THE FEDERALIST No. 28, at 180 (C. Rossiter ed. 1961) (A. Hamilton). *See also* Meiklejohn, *What Does the First Amendment Mean*, 20 U. CHI. L. REV. 461 (1953).

35. Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring, joined by Holmes, J.).

advocated would harm society and there is no time after the advocacy to dissuade listeners from the act, then the only means of preventing the harm is to punish the speech. Laws punishing such speech are directed to a legitimate purpose and could be reenacted for that purpose even if stricken because originally enacted with an unlawful motive. This is the essential nature of the "clear and present danger" test; it obviates the need for an inquiry into actual legislative motivation by assuring that there exists a legitimate purpose for which the legislation could be reenacted.

Three decades after Holmes and Brandeis began to develop their concepts in dissent, the majority of the Court acknowledged their correctness in *Dennis v. United States*:[36] "Although no case subsequent to *Whitney* and *Gitlow* has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale." The Court went on to quote from its opinion in *American Communications Association v. Douds*:[37] the first amendment "requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantial public evil will result therefrom."[38]

But temporary agreement on a phrase representing, as Brandeis called it, "an emergency,"[39] did not result in total agreement on what would constitute such an emergency. Brandeis and Holmes themselves may have been willing to prohibit advocacy of specific acts in the immediate future even though the advocacy had no substantial likelihood of producing such acts. Thus Holmes said:[40]

> I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces *or is intended to produce* a clear and imminent danger that it will bring about *forthwith* certain substantive evils that the United States constitutionally may seek to prevent.

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36. 341 U.S. 494, 507 (1951). The quote is from the plurality opinion of Chief Justice Vinson for four justices. Justice Douglas in dissent also asserted that the proper test was that fashioned by Justices Holmes and Brandeis, *id.* at 585–87, but he would have applied it quite differently to the facts and avoided the gloss put on it by the Court's use of Judge Learned Hand's formula, discussed at note 43 and accompanying text *infra*.

37. 339 U.S. 382, 412 (1950).

38. 341 U.S. at 508.

39. "Only an emergency can justify suppression." Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring, joined by Holmes, J.).

40. Abrams v. United States, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting, joined by Brandeis, J.) (emphasis added).

And Brandeis wrote:[41]

> In order to support a finding of clear and present danger it must be shown either that *immediate* serious violence was to be expected *or was advocated,* or that the past conduct furnished reason to believe that such advocacy was then contemplated.

These statements should be compared with Holmes' dissent in *Gitlow,* which Brandeis joined, where he said:[42]

> If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object would have been one with which the law might deal, *subject to the doubt whether there was any danger that the publication could produce any result,* or in other words, whether it was not futile and too remote from possible consequences.

Whatever Holmes and Brandeis thought about speech which urged specific illegal acts in the immediate future, but which had little chance of success, it seems clear that they thought only speech urging *immediate* action would be punishable. The Court in *Dennis* adopted their formulation in one breath and in the next destroyed this idea of immediacy. Chief Justice Vinson translated "clear and present danger" to mean "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[43] This formulation gives no specific weight to the factors of gravity or improbability so the Court may, as it did in *Dennis,* find that a sufficiently grave evil such as revolution by violence justifies a prohibition on speech although the probability of the present occurrence of the evil seems to be zero and its probability over the long run is also slight.

Subsequently, in a series of cases further interpreting the Smith Act,[44] the Court tightened the *Dennis* standard to exclude restraints

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41. Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring, joined by Holmes, J.) (emphasis added).

42. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting, joined by Brandeis, J.) (emphasis added).

43. 341 U.S. at 510. Chief Justice Vinson was adopting the formulation given by Judge Learned Hand in the court below. 183 F.2d 201, 212 (2d Cir. 1950). Defendants in *Dennis* were convicted for violating the Smith Act which proscribed "knowingly or willfully conspiring to organize [as the Communist Party of the United States] a society, group or assembly of persons who teach, advocate or encourage the overthrow and destruction of the Government of the United States by force or violence." 18 U.S.C. § 2385 (1970).

44. Note 43 *supra.*

directed at ideas rather than at action. In *Yates v. United States*,[45] the Court declared, "The essential distinction is that those to whom the advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe* in something." Disagreement with an idea and fear that people will believe it and change the laws to make action in furtherance of that idea legal can never be a basis for suppressing the idea. Any suppression of the idea must be based on, and must be incidental to, the prevention of specific harmful acts. The advocacy of the doctrine that government should be overthrown by force is permitted, but the speaker may not specify the acts of force he urges to accomplish that goal. An individual member of an organization that engages in such illegal advocacy can be convicted only if, knowing of such illegal advocacy and with the specific intent to promote the overthrow of the government, he or she is an "active" member.[46] Although these tests are helpful in focusing the government's regulation more clearly on the feared acts rather than on the suppression of ideas, they still permit the restriction of speech urging specific action in the distant future.

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45. 354 U.S. 298, 325–26 (1957). Professor Gellhorn has illustrated the distinction with a dangerous example:

> [O]ne can recognize a qualitative distinction between a speaker who expresses the opinion before a student audience that all law professors are scoundrels whose students should band together to beat them within an inch of their lives, and a second speaker who, taking up that theme, urges the audience to obtain baseball bats, meet behind the law faculty building at three o'clock next Thursday afternoon, and join him in attacking any professor who can then be found. The first speaker . . . should not be prosecuted; the second has stepped over the line between advocating a belief and advocating an illegal action.

W. GELLHORN, AMERICAN RIGHTS 80–81 (1960).

46. Scales v. United States, 367 U.S. 203 (1961). The Court upheld the conviction of Scales under the Smith Act. There was evidence that Scales was the director of a secret school for Communists where students were told that the Party needed to place people in key industrial positions, and where in Scales' presence, students were shown how to kill with a pencil. In a companion case, Noto v. United States, 367 U.S. 290 (1961), the Court reversed similar convictions because the evidence showed only advocacy of the doctrine of overthrow. The requirement of "active membership" and "specific intent" forced the prosecution to show in each case that specific future action was urged and prevented the automatic use of characteristics of the Communist Party found to exist in one case in any other case.

Notice that the Court does not require that an individual's acts alone present any kind of clear and present danger where he is a member of a revolutionary organization, only that the organization pose such a danger and that he be an integral part of its illegal plan. If such persons' acts and speeches were looked at in isolation, no one person would pose a danger. Thus the Court assumes that it may properly look to aggregate effect and then stop those persons who contribute knowingly with a purpose of achieving that result. If all such persons were stopped, the danger would likely cease.

More recently, in *Brandenburg v. Ohio*,[47] the Court seemed to adopt fully the Holmes-Brandeis standard including a requirement that even specific advocacy have a likelihood of success:[48]

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

But the apparent requirement of immediacy implied by the phrase "imminent lawless action" was rendered questionable by the Court's citation of *Dennis* as support for its standard. Thus instead of using the most common meaning of imminent — "likely to occur at any moment"[49] — the Court may have merely used "imminent" to mean "overhanging" or threatening to occur at some indefinite time. Justice Black's concurrence attempted to denigrate the significance of the cite to *Dennis*. "I join in the Court's opinion, which, as I understand it, simply cited *Dennis v. United States,* but does not indicate any agreement on the Court's part with the 'clear and present danger' doctrine on which *Dennis* purported to rely."[50]

Later statements by individual members of the Court indicate the possibility that the language of *Brandenburg* cannot be relied upon. Justice Stewart for the Court in *Law Students Civil Rights Research Council, Inc. v. Wadmond*[51] stated, "We have held that knowing membership in an organization advocating the overthrow of the Government by force or violence, on the part of one sharing the specific intent to further the organization's illegal goals, may be made criminally punish-

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47. 395 U.S. 444 (1969). The Court in *Brandenburg* held unconstitutional the Ohio Criminal Syndicalism statute for purporting to punish "mere advocacy not distinguished from incitement to imminent lawless action" and reversed the defendant Ku Klux Klan leader's conviction thereunder. Although the Court now uses the *Brandenburg* formulation rather than "clear and present danger," the *Brandenburg* test is derived from the "clear and present danger" test and serves the same function. Subsequent references to "clear and present danger" should therefore be read to include the more precise formulation of the test enunciated in *Brandenburg*.

48. 395 U.S. at 447.

49. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 712 (1966).

50. Brandenburg v. Ohio, 395 U.S. 444, 450 (1969) (citation omitted). *See* N. NATHANSON, THE RIGHT OF ASSOCIATION IN THE RIGHTS OF AMERICANS 237 (N. Dorsen ed. 1970).

51. 401 U.S. 154, 165 (1971). *Wadmond* involved the propriety of questions relating to character for admission to the bar. The state's concern was with the character of the applicant and not with the incitement of third parties by his or her prior statements. Thus, this was not a true "clear and present danger" problem; a true one might cause Justice Stewart, and Justice Marshall (*see* text preceding note 52 *infra*), to modify the generalizations offered in *Wadmond*.

able." His language may merely have been elliptical in omitting to stress that the advocacy must be of action and not ideas and in neglecting the requirement of "active" rather than "passive" membership, but it reinforces the notion that the Court will permit restrictions on the advocacy of action to take place in the indefinite future. Justice Marshall, joined by Justice Brennan, dissented, stressing the imminency requirement but also implying that the requirement that speech be likely to produce illegal action is not to be taken seriously, at least where the intent of the speech is to produce such action. "Second, no attempt has been made to limit Question 26(a) to associational advocacy of concrete, specific and imminent illegal acts, *or* to associational activity that creates a serious likelihood of harm through imminent illegal conduct."[52]

The Court reaffirmed the *Brandenburg* language in an opinion by Justice Brennan joined by Stewart, Marshall, White and Douglas in *Communist Party v. Whitcomb*.[53]

The Court also based its per curiam opinion in *Hess v. Indiana*[54] on the *Brandenburg* test. Rehnquist, Burger and Blackmun, dissenting in *Hess,* appeared to agree that *Brandenburg* was the appropriate standard but argued that the evidence supported the trial court's finding[55] that the appellant's statement was intended to "incite further law-

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52. *Id.* at 197 (emphasis added). Question 26(a) asked applicants if they had ever

> organized or helped to organize or become a member of any organization or group of persons which, during the period of [their] membership or association, [they] knew was advocating or teaching that the government of the United States or any state or political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means.

Id. at 188 n.4.

53. 414 U.S. 441 (1974). Justices Powell, Blackmun, Rehnquist and Burger concurred in the invalidation of an Indiana oath requirement. They found that the oath violated equal protection because it was not required of the Republican or Democratic parties. Thus, they avoided a direct first amendment decision.

The *Whitcomb* opinion suggests that the *Brandenburg* rules, read in the light of *Yates* and *Scales,* apply not only to criminal punishment but also to eligibility for public employment and access to other benefits. Communist Party v. Whitcomb, 414 U.S. 441, 448 (1974). *See also* note 51 *supra.* But the willingness to discuss whether access to ballot position may be distinguished betokens a readiness to dispense with the test where it does not fit. It only clearly applies to criminal sanctions on revolutionary advocacy.

54. 414 U.S. 105 (1973). The Court reversed the conviction of a demonstrator who, while police were clearing the street of demonstrators, stated in a loud voice either "We'll take the fucking street later," or "We'll take the fucking street again." The majority found there was no evidence that the words were intended to produce *imminent* disorder.

55. "The simple explanation for the result in this case is that the majority has interpreted the evidence differently from the courts below." *Id.* at 111.

less action on the part of the crowd in the vicinity of appellant and was likely to produce such action."[56]

Thus, all the members of the present Court who have addressed the issue appear to adhere to some form of a "clear and present danger" test for speech advocating action. In the recent past, however, several justices, notably Douglas and Black, have been dissatisfied. They have argued that the government cannot take preventive action based on speech, but can only prohibit the acts themselves:[57]

> The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.
>
> The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre.
>
> This is, however, a classic case where speech is brigaded with action. . . . They are indeed inseparable and a prosecution can be launched for the overt acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution.

This test would preserve ideas while assessing liability for illegal acts on the speaker who urges them. But what if a speaker's advocacy of arson is unsuccessful solely because of a sudden shower which falls immediately after his speech? Is the speaker to be free to try again to get the crowd to commit arson on the following day, or is the nearness of the speech to illegal action so great as to be termed speech "brigaded with action"? A theory of speech which protects the speaker because of a sudden downpour or a fortuitous arrival of police is unlikely to commend itself to the majority of the Court. A standard that would condemn such speech as being "brigaded with action," however, would still leave to the judgment of the Court the issue of proximity to illegal action. The effect of such terminology in place of "clear and present danger" would simply result in requiring a greater sense of impending harm.[58]

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56. *Id.* at 108.

57. Brandenburg v. Ohio, 395 U.S. 444, 456–57 (1969) (Douglas, J., concurring, joined by Black, J., at 449–50).

58. The Court has used the "clear and present danger" test in one other context, namely, where speech is suppressed in order to preserve the fair administration of justice. The danger feared in most of these cases is the intimidation of those charged with carrying out the judicial process by those who wish to see a particular result obtained. Instead of being concerned that the act urged is unlawful, the government is concerned that a lawful act will be done at the speaker's urging because the speech contains an unlawful or improper threat, that is, that the decision of a tribunal will be based on fear rather than on the merits of the particular case. Such a decision would be improper, but it would be impossible to punish the tribunal because of the

The use of the clear and present danger standard is intelligible because the concern is whether some listener will *act* upon the words of the speaker. The speaker may have ideas to ventilate but there would be significant injury to the governmental system if the listener acted as directed. In order to be certain that legislation is directed at vindicating these interests and not at suppressing criticism of government, a test of the clear and present danger of the substantive evil is used.[59] Since the law ostensibly protecting the governmental interest

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subjective nature of these influences. One response is to set aside verdicts which may have been the result of improper pressure. The other is to act against the persons who are exerting such pressure.

Again, all the justices agree that the government may not suppress bona fide criticism of the judiciary but may suppress speech or acts which prevent its impartial functioning. A minority of the justices are willing to find that threats of adverse action are an impairment of justice, while the majority treat judges as hardy creatures less subject to intimidation. Thus, in Times-Mirror Co. v. Superior Court, 314 U.S. 252 (1941), and a companion case, Bridges v. California, 314 U.S. 252 (1941), the majority struck down convictions for newspaper editorials stating what action the paper thought should be taken in a pending case and for a telegram to the Secretary of Labor which threatened a strike of the ports if a particular judicial decision was enforced. The standard of clear and present danger was reaffirmed in Pennekamp v. Florida, 328 U.S. 331, 346–47 (1946), "[T]here are areas of discussion which an understanding writer will appraise in the light of the effect on himself and on the public of creating a clear and present danger to fair and orderly judicial administration." Shortly thereafter, in Craig v. Harney, 331 U.S. 367, 376 (1947), the Court made clear that the danger must be quite substantial, "Judges are supposed to be men of fortitude, able to thrive in a hardy climate." The dissenters in *Craig* and *Bridges* agreed that a state may aim its laws at preventing a judge from deciding cases because of pressure outside the courtroom, but were more willing to protect the judge in a pending case from the possibility that such pressures would influence him. The clear and present danger standard for publications critical of the court was reaffirmed most recently in Wood v. Georgia, 370 U.S. 375 (1962).

59. Professor Frank Strong has argued that the clear and present danger test should have a broader application than merely to speech which advocates particular action. Rather, he would use it as a standard for determining whether the governmental action was indeed necessary to further the legitimate governmental objective. There must be

> a judgment on whether legislation or other governmental action under challenge bears a sufficient nexus to objectives of government determined, through the definitional process, to be consistent with the reach of constitutional restriction. Clearly, the tightness of the nexus that is required will have a direct bearing on the outcome in a given context of validity or invalidity. Thus requirement of but a rational nexus would result in little invalidity. By a metamorphosis no more strained than those earlier experienced, "clear and present danger" could transform into a requirement in First Amendment litigation of a strong demonstration of constitutionality that would force governmental respect for the protected civil interests of the individual.

Strong, *Fifty Years of "Clear and Present Danger": From* Schenck *to* Brandenburg — *and Beyond,* 1969 SUP. CT. REV. 41, 64. While, as indicated above, "clear and present danger" or similar language has been used to show the nexus where the legitimate

also suppresses speech, the Court wants to be certain that the legislature intended only to vindicate the legitimate governmental interest and that any infringement on speech was purely incidental. But a rule based directly on motivation may fail because illicit motives, though present, cannot be proved. Instead, the Court attempts to make sure that the legislation was properly motivated by applying a test of necessity. If the law was necessary to prevent the act, presumably it would be reenacted for proper reasons even if the original enactment stemmed from bad ones. Rather than invalidating the law and creating a hiatus that might foster the illegal acts, the Court refuses to look at motivation directly and approves the law. While all the justices seem to be reaching for the same concept, they entertain differing perceptions of what constitutes the requisite necessity. Some find it in mere advocacy of specific, concrete immediate acts because such advocacy does not permit time for counterargument and because judicial judgments on the likelihood of affirmative response are difficult to make.[60] Others find necessity where the evil is overwhelming and the advocacy is specifically directed to accomplishing that illegal goal by specified action even though such action is not to take place for an indefinite period of time. Still other judges would call for a combination of advocacy of specific illegal acts together with a substantial likelihood that the advocacy would succeed. Although individual judgments on where to draw the line vary, the function of the line seems the same to all the judges — to prohibit the government from suppressing ideas *qua* ideas while permitting it to prevent illegal action which could follow from such ideas.

UNPROTECTED SPEECH

The "clear and present danger" test in its myriad forms was designed to deal with harm resulting from the acts of one person responding to the speech of another. In some situations, however, the speech itself is perceived to inflict a harm. In such cases there is always a "clear and present danger," and such a test would not be helpful in distinguishing whether the law is directed at preventing the harm or suppressing the ideas which may be inseparable from the infliction of

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governmental objective is prevention of an act which is urged by speech, the Court itself has not used such terms in other areas. Instead, it has referred to the *O'Brien* language of "essential to the furtherance of that interest" in its use of balancing and the ancillary doctrines of overbreadth and vagueness. Nevertheless, Professor Strong's concept is a useful reminder of the need to assure a tight nexus between the legitimate objective and the law.

60. For example, statistically the chance that anyone will obey the speaker's direction may be slight, but there is always the possibility that some individual already somewhat unbalanced could in fact be so inspired.

harm. In this area the Court has used definitional techniques to give protection against the injury — the "verbal blow" — while protecting the idea. In *Chaplinsky v. New Hampshire*,[61] the Court set forth several classes of speech which it stated to be outside the protection of the first amendment:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."

The pronouncement in *Chaplinsky* was the starting point for the "two-level"[62] theory of speech, the notion that certain kinds of speech are not protected under the first amendment. On the face of the opinion, the Court made a judgment on the value of certain speech. Ever since this case, the Court has been haunted by the spectre that in the name of freedom of expression it is judging the worth of ideas and suppressing those which it considers of little value. In each of these classes of speech, the Court has been wrestling with various concepts in its attempt to keep its actions clear of that condemnation. The Court's approach has been to define "unprotected speech" in terms of the context in which it was uttered rather than the content of the speech alone. If, in context, the speaker is apparently using words or pictures to inflict an injury and not to convey ideas for discussion and deliberation, the Court will be satisfied that a prohibitory law is not directed at the suppression of ideas.[63]

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61. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (footnotes omitted), *quoting in part*, Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940).

62. *See* Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 10; Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 217.

63. This theory bears a strong relationship to Alexander Meiklejohn's theory of free speech. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). Meiklejohn distinguished between "public" speech and "private" speech. He argued that freedom of speech on matters affecting self-government is not open to restriction by the government, but that private discussion not dealing with the process

Fighting Words

> They tell me I say ill-natured things. I have a very weak voice; if I did not say ill-natured things no one would hear what I said.[64]

Chaplinsky was the first case in which the Court sustained a conviction under a statute proscribing the use of "fighting words:"[65]

> The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker — including 'classical fighting words,' words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats.

The reference to words "plainly likely to cause a breach of the peace by the addressee" suggests that fighting words are not a distinct form of speech, but should be governed by the "clear and present danger" test. If the act to be prevented is the striking of the speaker by the addressee, the clear and present danger test should apply. This approach focuses on the listener's attitude and results in a "heckler's veto."[66] Such a rule protects the speaker by silencing him and encourages hostility in the audience since they can stop the speaker by threatening him. However, even in *Chaplinsky,* the Court brackets "fighting words" with "other disorderly words, including profanity [and] obscenity . . ." which are not as likely to cause physical attacks indicating that the potential for "a breach of the peace by the addressee" is not an essential element of unprotected speech. In particular, the Court has defined fighting words as "those which by their very utterance inflict injury *or* tend to incite an immediate breach of the peace."[67] This definition in the alternative makes it clear that likelihood of violence is connected to fighting words but is not an essential part of it.

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of self-government was protected only by notions of due process which do not include the absolute concepts of the first amendment. Thus, discussion of the overthrow of government would receive protection while fighting words, obscenity, private libel and commercial speech presumably could not. For an interesting criticism of Professor Meiklejohn's theories, see the review of his book by Professor Chafee in 62 HARV. L. REV. 891 (1949).

64. Samuel Rogers, in THESAURUS OF ANECDOTES, No. 518 (E. Fuller ed. 1948).

65. 315 U.S. at 573 (citation of lower court opinion omitted).

66. *See* H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 140–41 (1966).

67. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (emphasis added) (footnotes omitted); *See also* Gooding v. Wilson, 405 U.S. 518, 523 (1972); Lewis v. New Orleans, 415 U.S. 130, 132 (1974). The connection may be that certain direct personal insults are so deliberately injurious that they would justify a violent response even though the addressee in fact is not likely so to respond. There is no clear and present danger of violence, but an injury has occurred.

What then does the Court regard as "fighting words"? The early cases seemed to focus on the words themselves. The "classical" fighting words used by Chaplinsky were "damned racketeer" and "damned Fascist." The Court declared, "Argument is unnecessary to demonstrate that the appellations 'damned racketeer' and 'damned Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace."[68]

Chaplinsky has been cited many times, but the Court has never since affirmed a conviction based on fighting words in a full-opinion decision.[69] In *Terminiello v. Chicago*,[70] Justice Jackson, joined by Justice Burton, attempted to use the concept of fighting words to support the conviction of an anti-semitic speaker:[71]

> Only recently this Court held that a state could punish as a breach of the peace use of epithets such as "damned racketeer" and "damned fascist," addressed to only one person, an official, because likely to provoke the average person to retaliation. But these are mild in comparison to the epithets "slimy scum," "snakes," "bed bugs" and the like, which Terminiello hurled at an already inflamed mob of his adversaries.

But the majority reversed the conviction on the grounds that the trial judge's instruction permitted conviction for merely inviting dispute or bringing about a condition of unrest. Since the charge was defective, the Supreme Court did not reach the question of whether the evidence would have supported a conviction under a proper charge.

Two years later, again in dissent, Justice Jackson attempted to use *Chaplinsky* to justify a refusal to grant a speaker a permit in *Kunz v. New York*:[72]

> Equally inciting and more clearly "fighting words" when thrown at Catholics and Jews who are rightfully on the streets of New York, are statements that "The Pope is the anti-Christ" and the Jews are "Christ-killers." These terse epithets come down to our

68. 315 U.S. at 574.

69. *But see* Lucas v. Arkansas, 96 S. Ct. 17 (1975), *dismissing appeal from* ___ Ark. ___, 520 S.W.2d 224 (1975). The Court in *Lucas* dismissed for want of a substantial federal question the appeal of a fighting words conviction (discussed at notes 95–98 and accompanying text *infra*). Such a decision is a vote on the merits of the case. *See* Ohio *ex rel.* Eaton v. Price, 360 U.S. 246 (1959). But a decision rendered solely on the basis of the jurisdictional statement without briefs or oral argument may be entitled to less weight than a decision made after oral argument. *See* Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent*, 52 B.U.L. REV. 373 (1972).

70. 337 U.S. 1 (1949).

71. *Id.* at 26.

72. 340 U.S. 290, 299 (1951).

> generation weighted with hatreds accumulated through centuries of bloodshed. They are recognized words of art in the profession of defamation. They are not the kind of insult that men bandy and laugh off when the spirits are high and the flagons are low. They are not in that class of epithets whose literal sting will be drawn if the speaker smiles when he uses them. They are always, and in every context, insults which do not spring from reason and can be answered by none. Their historical associations with violence are well understood, both by those who hurl and those who are struck by these missiles.

The majority once more failed to address the issue of "fighting words." They held that the speaker's conviction was improper because there were no standards established to guide the administration of the permit system.

In *Feiner v. New York*,[73] decided the same day as *Kunz*, the majority upheld the breach of the peace conviction of a sidewalk speaker, but made no attempt to select particular phrases of his speech as "fighting words." The Court intimated that the speaker may have incited his followers to riot and that police action was appropriate to maintain the peace in the face of a hostile crowd reaction. Justice Douglas, dissenting, noted that Feiner had said, "The American Legion is a Nazi Gestapo," but Douglas said that such language was not "fighting words": "A speaker may not, of course, incite a riot any more than he may incite a breach of the peace by the use of 'fighting words.' See *Chaplinsky v. New Hampshire* . . . . But this record shows no such extremes."[74]

The Court finally faced squarely a claim of "fighting words" in *Street v. New York*.[75] The defendant had burned an American flag in the street, saying, "We don't need no damn flag." He then stated to a police officer, "If they let that [attempted assassination] happen to Meredith we don't need an American flag."[76]

> Though it is conceivable that some listeners might have been moved to retaliate upon hearing appellant's disrespectful words, we cannot say that appellant's remarks were so inherently inflammatory as to come within that small class of "fighting words" which are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky v. New Hampshire*.[77]

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73. 340 U.S. 315 (1951).

74. *Id.* at 331. It is interesting to note that the police took action against Feiner only after an onlooker told the officers "if they did not take that 's . . . o . . . b . . .' off the box, he would." *Id.* at 324 (Black, J., dissenting). The strongest epithet in the case was thus uttered by a spectator rather than by the defendant speaker.

75. 394 U.S. 576 (1969).

76. *Id.* at 598–99 (Warren, C.J., dissenting).

77. *Id.* at 592 (citation omitted).

Without passing on the constitutionality of penalizing the burning of a flag, the Court reversed the conviction. It found the judge's charge defective because it permitted conviction for what Street said, although, in fact, his statements were constitutionally protected.

Douglas' comments in *Feiner* and the holding of the Court in *Street* suggest that agreement on the content of "fighting words" may not be easy to reach. The statement in *Chaplinsky* that argument was not necessary to demonstrate that the words used there were "fighting words" is questionable. The impropriety of attempting to excise specific words from speech was effectively stated by Justice Harlan in *Cohen v. California.*[78] Mr. Cohen was convicted of disturbing the peace by offensive conduct when he wore in a courthouse a jacket that said "Fuck the Draft." In reversing his conviction, Justice Harlan said:[79]

> Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.
>
> Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. . . .
>
> Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.

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78. 403 U.S. 15 (1971).

79. *Id.* at 25-26.

These same points apply to "fighting words" as well. There simply is no principled basis for defining which words are permissible. Note that the Court was unanimous in finding "Fascist" a fighting word in *Chaplinsky* while Douglas thought "Nazi Gestapo" quite permissible in *Feiner*. Second, "fighting words" obviously serve an emotive function. The first amendment surely protects the freedom of one individual to tell another he dislikes him. The depth of the dislike is part of the idea, and it may be that only very harsh words will demonstrate the degree of dislike. Thus, suppressing "fighting words" may have the effect of suppressing ideas. This is particularly true in a situation like *Chaplinsky*. There an official was participating in restraining Chaplinsky from exercising his rights of speech to the public. Outraged by such treatment, Chaplinsky condemned him in strong terms. The officer then pressed the charges which resulted in conviction. The more oppressive the action of the officials, the more vigorous may be the protest against such action. Thus, use of the "fighting words" doctrine may be an effective weapon in silencing dissent from governmental policies.

Nevertheless, Justice Harlan acknowledged *Chaplinsky* to be good law — at least in a somewhat modified form:[80]

> This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called "fighting words," those personally abusive epithets which, when addressed to the *ordinary citizen,* are, as a matter of common knowledge, inherently likely to provoke violent reaction. *Chaplinsky v. New Hampshire* . . . . While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not "directed to the person of the hearer." *Cantwell v. Connecticut* . . . . No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult.

The reference to the "ordinary citizen" indicates that the Court perceived the possibility of repression inherent in allowing governmental officials to jail dissenters who express their opposition to official acts in strong language. It is clear from *Cohen,* in any event, that what may be prohibited is not the words themselves, but a particular use of them.

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80. *Id.* at 20 (emphasis added). The Court in both Cohen v. California, 403 U.S. 15 (1971), and Street v. New York, 394 U.S. 576 (1969), referred to "fighting words" as those likely to provoke a violent reaction, but in both cases the facts show the words were not used as a direct personal insult, and later discussions of the concept continue to define it in the alternative as words inflicting injury *or* inciting a breach of the peace.

The essential notion seems to be that in certain situations words are used for the purpose of inflicting injury. They produce a reaction on a non-rational level just like being hit by a stone. Throwing a stone is an expression of hostility, but most people would agree that the use of the stone as a means of expression makes the act inflicting injury an unprotected one. The Court sees "fighting words" in the same terms. Although there may be an idea connected with the epithet, the law is directed against the injury and not the idea. This is assured because the expression is prohibited only under very narrow circumstances. It is permissible to use "fighting words" about an individual so long as one is not addressing that individual because no infliction of injury or likelihood of retaliation occurs; and a speaker may condemn another to his face if the statement conveys an idea and is not uttered solely for the sake of injuring.

Recently, the Court has taken a group of cases involving "fighting words." In *Gooding v. Wilson*,[81] a war protester objecting to police action trying to restore access to a picketed building threatened, "White son of a bitch, I'll kill you" and "You son of a bitch, I'll choke you to death." He was convicted of using "opprobrious words or abusive language, tending to cause a breach of the peace" in violation of the Georgia Code.[82] Without passing on whether the specific remarks of defendant could be punished under a properly drafted law, the Court reversed the conviction. The majority held the statute on its face to be unconstitutionally vague and overbroad in that it could apply to any words which the hearer found offensive. Unless the statute were invalidated, it would operate to deter expression of unpopular or offensive ideas.

The Court also remanded a group of cases in light of *Gooding*.[83] One of them, *Lewis v. New Orleans*,[84] returned to the High Court after the remand.[85] In *Lewis* a mother and father were following a police patrol car taking their son to the station after his arrest. Another police car stopped them and asked the father for his driver's license. The mother got out of the car and the officer testified that she "started yelling and screaming that I had her son or did something to her son and she wanted to know where he was. . . . She said, 'you god damn m. f. police — I am going to [the Superintendent of Police] about

81. 405 U.S. 518 (1972).

82. GA. CODE ANN. § 26-6303 (Supp. 1965), *as amended*, GA. CODE ANN. § 26-2610 (Supp. 1975).

83. The cases were Rosenfeld v. New Jersey, 408 U.S. 901 (1972), Brown v. Oklahoma, 408 U.S. 914 (1972), and Lewis v. New Orleans, 408 U.S. 913 (1972).

84. 408 U.S. 913 (1972) [hereinafter cited as *Lewis I*].

85. Lewis v. New Orleans, 415 U.S. 130 (1974) [hereinafter cited as *Lewis II*].

this.' "[86] The officer immediately arrested her for violating a New Orleans ordinance which provided:[87]

> It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.

The mother was convicted of violating the statute. On remand for reconsideration after *Gooding,* the Louisiana Supreme Court again upheld the conviction without narrowing the statutory language. The state court said the statute as written "is narrowed to 'fighting words' uttered to specific persons at a specific time."[88]

The United States Supreme Court then held that the statute as construed by the Louisiana state court was potentially applicable to protected speech, and was therefore overbroad and facially invalid. The Court said the word "opprobrious" which embraces words " 'conveying or intended to convey disgrace' " is not limited to words which " 'by their very utterance inflict injury or tend to incite an immediate breach of the peace.' "[89] Of course, words conveying disgrace to an officer inflict injury on that officer's self-esteem. But such injury is an inevitable incident to the expression of the idea that the police acted wrongly. The Court seems to require that the injury in "fighting words" stem from the speaker's use of language deliberately chosen for its offensive value; offensiveness necessarily incidental to expression of the speaker's idea is permissible. Were it otherwise, the legislature — and the police — could suppress ideas they found odious.

The dissent in *Lewis II* takes the majority to task for focusing on hypotheticals and not on the specific words of the case.[90] But, in fact, the specific words ("m. f.") used by defendant may not be "fighting words" to a majority. In *Papish v. Board of Curators of the University of Missouri,*[91] the Court specifically found that the headline "Mother Fucker Acquitted" and a cartoon of police raping the Statue of Liberty and the Goddess of Justice could not "be labelled as constitutionally obscene or otherwise unprotected." "[T]he mere dissemination of ideas — no matter how offensive to good taste — on a state university

86. *Id.* at 131 n.1. The use of elision in writing the offending words in this article varies to follow the practice of the Court in the particular cases.

87. *Id.* at 132.

88. 263 La. 809, 825, 269 So. 2d 450, 456 (1972).

89. *Lewis II,* 415 U.S. 130 (1974).

90. "[I]t is no happenstance that in each case the facts are relegated to footnote status, conveniently distant and in a less disturbing focus." *Id.* at 137 (Blackmun, J., joined by Burger, C.J., & Rehnquist, J., dissenting).

91. 410 U.S. 667 (1973).

campus may not be shut off in the name alone of 'conventions of decency.' "[92] The Court further noted, "Under the authority of *Gooding* and *Cohen,* we have reversed or vacated and remanded a number of cases involving the same expletive used in this newspaper headline."[93] This note implied that the words themselves, contrary to the dissent, are no longer punishable. To return to Justice Harlan, "one man's vulgarity is another's lyric."[94]

Subsequently the Court vacated judgments and remanded four additional cases in light of *Lewis II*.[95] Justice Douglas dissented from the disposition of these cases, arguing that the state courts had sufficient warning, at least by the time of *Gooding,* that their failure to give the statutes narrow constructions would require reversals rather than remands.[96] Blackmun, joined by Burger and Rehnquist, dissented in one of the remands, *Lucas v. Arkansas*,[97] arguing as they did in *Lewis II* that the statute had been sufficiently narrowed. On remand, the statute in *Lucas* was construed to apply only to language the choice of which would commonly be considered calculated to anger the person toward or about whom it is used, when used in that person's presence or hearing. The Arkansas Supreme Court upheld Lucas' conviction. The Supreme Court recently dismissed the appeal from that decision[98] with Justices Douglas and Marshall observing that they would have noted probable jurisdiction.

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92. *Id.* at 670.

93. *Id.* at 670 n.5. *Papish* itself did not involve "fighting words" as the newspaper article was far from a face-to-face insult. Thus, the noting of the *Gooding* line of cases is significant as an indication that Harlan's attitude toward vulgar speech in *Cohen* may be applied to face-to-face insults as well.

94. Cohen v. California, 403 U.S. 15, 25 (1971).

95. The cases are Kelly v. Ohio, 416 U.S. 923 (1974), Rosen v. California, 416 U.S. 924 (1974), Karlan v. Cincinnati, 416 U.S. 924 (1974) and Lucas v. Arkansas, 416 U.S. 919 (1974). This listing does not include Eaton v. Tulsa, 415 U.S. 697 (1974), where the Court reversed a contempt of court citation of a defendant who used the words "chicken shit" in describing a person who allegedly hit him from behind. The per curiam opinion of the Court said, "This single isolated usage of street vernacular, not directed at the judge or any officer of the court, cannot constitutionally support the conviction of criminal contempt." *Id.* at 698. The dissenters argued that more conduct towards the presiding judge should have been considered and that such conduct was sufficient to sustain the charge. *Eaton* is not, strictly speaking, a "fighting words" case as were the other four cases mentioned in this note since Eaton was not addressing the individual of whom he was speaking. *See* text preceding note 81 *supra.*

96. 416 U.S. at 924 (Douglas, J., dissenting).

97. 416 U.S. 919, 921–22 (1974) (Blackmun, J., dissenting, joined by Burger, C.J., & Rehnquist, J.).

98. Lucas v. Arkansas, 96 S. Ct. 17 (1975), *dismissing appeal from* ___ Ark. ___, 520 S.W.2d 224 (1975).

The use of remands or the doctrine of overbreadth in all of the recent cases indicates that the Court is aware of how the "fighting words" doctrine can be used to suppress dissent from official action and that, it will be vigilant to prevent such suppression. *Lucas* shows that the concept of "fighting words" nonetheless retains its validity for face-to-face insults which in context have no purpose other than to bait the addressee.

Justices Burger, Blackmun and Rehnquist filed dissenting opinions in these cases, asserting that the statutes prohibited only "fighting words," and that only "fighting words" were uttered. Justice Blackmun was particularly critical in *Gooding,* saying: "I feel that by decisions such as this one and, indeed, *Cohen v. California* . . ., the Court, despite its protestations to the contrary, is merely paying lip service to *Chaplinsky.*"[99] The three Justices did elaborate on the need to limit "fighting words":[100]

> Civilized people refrain from "taking the law into their own hands" because of a belief that the government, as their agent, will take care of the problem in an organized, orderly way with as nearly a uniform response as human skills can manage. History is replete with evidence of what happens when the law cannot or does not provide a collective response for *conduct* so widely regarded as impermissible and intolerable.
>
> It is barely a century since men in parts of this country carried guns constantly because the law did not afford protection. In that setting, the words used in these cases, if directed toward such an armed civilian, could well have led to death or serious bodily injury. When we undermine the general belief that the law will give protection against fighting words and profane and abusive language such as the utterances involved in these cases, we take steps to return to the law of the jungle. These three cases, like *Gooding,* are small but symptomatic steps. If continued, this permissiveness will tend further to erode public confidence in the law — that subtle but indispensable ingredient of ordered liberty.

Several of these statements need clarification. First, the dissenters assume "fighting words" are "conduct," not speech. They seem thus to recognize that although certain *views* may be widely regarded as "impermissible and intolerable," that alone surely does not permit the state to prevent their expression. At the very least there must be a "clear and present" danger of violence occurring. This has been the teaching of the Court in countless cases. "Our decisions establish that

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99. 405 U.S. at 537.

100. Rosenfeld v. New Jersey, 408 U.S. 901, 902 (1972) (Burger, C.J., dissenting, joined by Blackmun & Rehnquist, J J.) (emphasis added).

mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms. See *Street v. New York; Cox v. Louisiana; Edwards v. South Carolina; Terminiello v. Chicago; Cantwell v. Connecticut; Schneider v. State.*"[101]

Second, the protection which "the law did not afford" a century ago was for the safety of person and property. The law then tolerated the use of force in self-defense or in defense of property. Shooting in response to a face-to-face insult, however, was then and is now normally regarded as murder.[102] The image invoked by the dissenters is greatly overdrawn with respect to problems posed by "fighting words." We cannot expect that failure to punish "fighting words" would cause our citizens to arm themselves. The dissenters appear to believe that laws prohibiting "fighting words" are useful in preventing violence. However, the impact of such laws is speculative. The private citizen does not ordinarily rely on the criminal process for protection against such insults. Regardless of the existence of any legal sanction to which the speaker may be subject, the listener is likely to reply in kind, strike the speaker, or ignore the speaker without seeking criminal action. The cases are almost entirely composed of insults directed at public officials rather than private citizens. For example, *Chaplinsky, Gooding,* and *Lewis* all involved remarks made to a police officer who was making an arrest. *Lucas v. Arkansas*[103] involved rude words spoken to a passing police officer. *Karlen v. Cincinnati*[104] was based on remarks by a person being questioned by police. *Rosen v. California*[105] involved remarks made to security guards in a search prior to entering a courtroom. *Brown v. Oklahoma*[106] involved remarks insulting police that were made at a public meeting by a member of the Black Panther Organization invited to speak about that organization. *Papish v. Board of Curators of the University of Missouri,*[107] involved a newspaper that published a cartoon critical of police and an article referring to a youth who was a member of an organization known as "Up Against the Wall, Mother-Fuckers," for which the individual distributing the paper was expelled from school. *Rosenfeld v. New Jersey*[108] involved remarks

101. Coates v. Cincinnati, 402 U.S. 611, 615 (1971) (citations omitted).

102. *See, e.g.,* State v. Bongard, 330 Mo. 805, 51 S.W.2d 84 (1932).

103. 416 US. 919 (1974).

104. 416 U.S. 924 (1974), *remanding* 35 Ohio St. 2d 34, 398 N.E.2d 573 (1973).

105. 416 U.S. 924 (1974), *remanding* No. CR A–11557 (L.A. Super. Ct., App. Dept., Jan. 2, 1973). Kelly v. Ohio, 416 U.S. 923 (1974), *remanding* No. 466 (Ohio Ct. App., July 31, 1972), is likely to fall into the category revealed by these cases, but the courts' opinions do not reveal the context of the remarks in that case.

106. 408 U.S. 914 (1972), *remanding* 492 P.2d 1106 (Okla. 1972).

107. 410 U.S 667 (1973).

108. 408 U.S. 901 (1972).

made at a school board meeting which insulted the teachers, the school board, the town and the nation. Thus, it is quite possible that the arrests in these cases were motivated, not by the desire to keep the peace, but by the desire to silence opposition or to get a good charge on an individual whose arrest would be improper otherwise.

The three dissenters find a legitimate interest in preventing certain speech critical of officials. Speaking of the New Orleans ordinance involved in *Lewis,* they said:[109]

> The ordinance, moreover, poses no significant threat to protected speech. And it reflects a legitimate community interest in the harmonious administration of its laws. Police officers in this day perhaps must be thick-skinned and prepared for abuse, but a wanton, high-velocity, verbal attack often is but a step away from violence or passioned reaction, no matter how self-disciplined the individuals involved. In the interest of the arrested person who could become the victim of police overbearance, and in the interest of the officer, who must anticipate violence and who, like the rest of us, is fallibly human, legislatures have enacted laws of the kind challenged in this case to serve a legitimate social purpose and to restrict only speech that is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."

But if the social interest were preventing police from assaulting the citizenry, a direct law prohibiting such responses by police would be preferable and less restrictive of speech.[110] If the social interest were avoiding criticism of governmental actions it would contravene the heart of the first amendment.

Perhaps the position of these dissenters is best understood by emphasizing the notion that such words are "conduct." Thus, in *Cohen,* Justice Blackmun, joined by Justices Burger and Black, stated, "Cohen's absurd and immature antic, in my view, was mainly conduct and little speech."[111] The words used are regarded as verbal brickbats. They are unnecessary to the expression of an idea and they offend hearers. Consequently, they can be restrained although the government has no intention of suppressing the ideas of the speaker.

Harlan's discussion in *Cohen,*[112] however, seems a convincing refutation of these dissenters' views. The attempt to limit the use of particular words carries with it a grave danger of censorship of oppo-

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109. *Lewis II,* 415 U.S. at 141.

110. The concept of less restrictive means is discussed at note 19 *supra.*

111. 403 U.S. at 27.

112. *Id.* at 15.

sition to governmental action.[113] Further, the dissenters do not seem to realize the extent to which such words permeate ordinary conversation.[114] Nine "old men" trying to purify a nation's speech habits is an inevitably futile effort. Success in such a dubious endeavor would require far sterner measures with corresponding results even more stifling to free expression.

Justice Powell has taken a more complex position. He would reach a different result for words addressed to certain public officials than for the same words used in a private altercation:[115]

> If these words had been addressed by one citizen to another, face to face and in a hostile manner, I would have no doubt that they would be "fighting words." But the situation may be different where such words are addressed to a police officer trained to exercise a higher degree of restraint than the average citizen.

Powell cites the comments to Model Penal Code section 250.1 which point out that police are more likely to provoke hostility and are more trained than ordinary citizens to resist being provoked.

The Model Code provision probably would not, in fact, have allowed the conviction of Chaplinsky. The "fighting words" statute of the Code is section 250.9(b): "A person commits a petty misdemeanor if he . . . offends or challenges another with purpose to provoke violence." With respect to the *Chaplinsky* facts the comments add, "[C]onviction might be had under Section 250.9(b), upon proof that Chaplinsky sought to provoke the officer to violence, although on the evidence this appears highly unlikely."[116] In *Lewis I* Justice Powell stated, "I would remand for reconsideration only in light of *Chaplinsky*,"[117] but when *Lewis* returned to the Court after the Louisiana court's reconsideration, Powell showed that he would in fact have followed the Model Penal Code and not the actual disposition of *Chaplinsky*:[118]

> It is unlikely . . . that the words said to have been used here would have precipitated a physical confrontation between the

113. *See Lewis II*, 415 U.S. 130, 134 (1974) (Powell, J., concurring). In addition, to the extent that certain words are used more frequently by particular groups or classes in society, the doctrine of "fighting words" may be used to oppress that group.

114. Since Clark Gable first said "Damn" in "Gone With the Wind," our motion pictures have reflected common language with increasing fidelity. The expletives deleted from ex-President Nixon's tapes are probably mild compared with those uttered by Jack Nicholson in "The Last Detail," but both indicated the common use of "taboo" language.

115. *Lewis I*, 408 U.S. 913 (1972) (Powell, J., concurring).

116. MODEL PENAL CODE § 250.1, Comment at 11 (Tent. Draft No. 13, 1961).

117. 408 U.S. at 914 (Powell, J., concurring).

118. *Lewis II*, 415 U.S. 130, 135 (1974) (Powell, J., concurring).

> middle-aged woman who spoke and the police officer in whose presence they were uttered. The words may well have conveyed anger and frustration without provoking a violent reaction from the officer.

Powell then noted the danger inherent in the dissenters' acceptance of restriction on some speech addressed to police, namely, that such an ordinance might be invoked to legitimize an arrest not otherwise proper: "The opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident."[119] It is not fully clear from *Lewis II,* however, whether Powell would follow the Model Penal Code in requiring a purpose to provoke an officer or whether he would merely require a high degree of likelihood that such words in context would be provoking.

Powell looks differently at the problem of taboo words addressed to a captive audience:[120]

> [T]he exception to First Amendment protection recognized in *Chaplinsky* is not limited to words whose mere utterance entails a high probability of an outbreak of physical violence. It also extends to the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience.

"Language calculated to offend" suggests once more the use of words to cause injury rather than to express ideas. Powell does not call for an inquiry into the speaker's purpose here, however. He notes that there is a harm apart from the ideas expressed so that the government may deal with it while permitting the same speech where the harm is not so evident:[121]

> For the increasing number of persons who derive satisfaction from vocabularies dependent upon filth and obscenities, there are abundant opportunities to gratify their debased tastes. But our

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119. *Id.* at 136.

120. Rosenfeld v. New Jersey, 408 U.S. 901, 905 (1972) (Powell, J., dissenting).

121. *Id.* at 909. Powell reiterated his views in his dissent, joined by Justice Rehnquist in Plummer v. City of Columbus, 414 U.S. 2, 3 (1973). The majority reversed appellant's conviction for violating Columbus City Code § 2327.03 which provides: "No person shall abuse another by using menacing, insulting, slanderous, or profane language." They held that the ordinance was invalid on its face until a satisfactory limiting construction is given, citing *Gooding* and Cason v. City of Columbus, 409 U.S. 1053 (1972). Powell, citing his *Rosenfeld* dissent said that vulgar, suggestive and abhorrent sexually oriented statements by a taxi driver to a passenger were not within first amendment protection. His concurrence in the *Cason* reversal which involved the same statute was based on his understanding that the court below applied a per se rule without regard to circumstances.

> free society must be flexible enough to tolerate even such a debasement provided it occurs without subjecting unwilling audiences to the type of verbal nuisance committed in this case. The shock and sense of affront . . . can be as great from words as from some physical attacks.

Thus Powell dissented from the remand in *Rosenfeld v. New Jersey* where the defendant used the words "m. . . . f. . . ." four times before a school board meeting where children, among others, were present. Powell viewed this as a captive audience.

Where it is not clear that the audience was captive and unwilling, however, Justice Powell would not allow prosecution. Concurring in the remand of *Brown v. Oklahoma,*[122] he said, "[T]he language for which appellant was prosecuted was used in a political meeting to which appellant had been invited to present the Black Panther viewpoint. In these circumstances language of the character charged might well have been anticipated by the audience."

The Court recognizes that certain words may be used to inflict injury on the person addressed. That injury is similar in nature to a physical attack. A law directed at preventing such injury serves a legitimate governmental purpose and ostensibly is not aimed at suppressing ideas. But a majority of the justices have noted the potential for censorship in laws prohibiting abusive language directed at public officials. Consequently, they have utilized ancillary first amendment concepts like overbreadth to reverse convictions. They would probably allow only laws prohibiting speech deliberately intended to provoke reaction. Otherwise it would be too easy to suppress dissent in the guise of suppressing "fighting words." Justice Powell agrees with the majority where the words are uttered in the context of an arrest or where the audience may be said to expect such language, but he would prohibit such speech in captive audience situations. This approach reduces the likelihood that the suppression is based on distaste for the ideas of the speaker. Finally, Justices Burger, Blackmun and Rehnquist focus on the words themselves and would protect the audience, whatever its nature, from being so affronted. Thus, as with the "clear and present danger" test, the Court seems in agreement over basic principles but differs over where the line should be drawn. Those justices most concerned with free expression attempt to place the line at a point which would insure that laws could not be used to suppress ideas while other justices are more concerned that the government have the power to protect against the "non-speech" harm.

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122. 408 U.S. 914 (1972) (Powell, J., concurring).

Obscenity

Closely related to the "fighting words" doctrine of *Chaplinsky* is the ban on obscenity. Indeed, the most recent "fighting words" cases involve language the offensiveness of which derives from sexual connotations. The Court first ventured into obscenity in *Roth v. United States*,[123] where referring back to *Chaplinsky*, the Court said, "[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."

Once more the Court puts itself in the position of apparently determining the worth of ideas. And again the Court seeks to avoid that imputation by defining the proscribed speech to exclude ideas. A brief history of the Court's development of the definition of obscenity may be useful in understanding how it can claim that it is not deciding the value of ideas. The definitional process began in *Roth* where the Court referred to the definition of obscenity by the American Law Institute: "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters."[124] Shortly afterwards Justice Harlan in a plurality opinion joined by Justice Stewart emphasized that the requirements of appeal to the prurient interest and exceeding "customary limits of candor" were separate and distinct elements of obscenity for federal purposes.[125] The notion of customary limits of candor as a separate element in the definition of obscenity was reaffirmed by Justice Brennan and applied to state laws in a plurality opinion joined by Justice Goldberg in *Jacobellis v. Ohio*,[126] which also added the concept of "social importance" as a separate element:

> We would reiterate, however, our recognition in *Roth* that obscenity is excluded from the constitutional protection only because

123. 354 U.S. 476, 484–85 (1957). It is interesting to speculate on why selling obscenity has been made illegal throughout the United States. Its only obvious effect is to arouse the sexual drive, but we do not normally forbid things simply because they are powerful or arouse strong emotions. I suspect the answer may lie in John Barth's comment — "for fucking dogs are truly funny." J. BARTH, THE FLOATING OPERA 108 (Bantam ed. 1967). If we observe others engaging in sex, we will consider it as simply another physical function and discover the magic and romance with which we invest it cannot be regained. *See* B. MALINOWSKI, SEX AND REPRESSION IN SAVAGE SOCIETIES (1927). This in turn suggests that obscenity legislation is motivated by a desire to suppress an idea — something which the Court majority refuses to admit.

124. *Id.* at 487, *citing* MODEL PENAL CODE § 207.10(2) (Tent. Draft No. 6, 1957).

125. Manual Enterprises v. Day, 370 U.S. 478, 487 (1962).

126. 378 U.S. 184, 191 (1964).

> it is "utterly without redeeming social importance," and that "the protrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." . . . It follows that material dealing with sex in a manner that advocates ideas, . . . or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection. Nor may the constitutional status of the material be made to turn on a "weighing" of its social importance against its prurient appeal, for a work cannot be proscribed unless it is "utterly" without social importance.

Justice Stewart concurred, stating that the criminal laws "are constitutionally limited to hard-core pornography. . . . I know it when I see it, and the motion picture involved in this case is not that."[127] Taken to gether with Black's and Douglas' position that there could be no censorship for obscenity, this case gave a temporary coalition which would protect any film not "patently offensive" (with Harlan's vote added if the material were forbidden by federal rather than state law) and probably any expression with "social importance" depending on what Stewart saw to be hard-core pornography.

The coalition which made the three element test of obscenity applicable was strengthened in *Memoirs of a Woman of Pleasure v. Attorney General*[128] where Brennan, joined by Chief Justice Warren and Justice Fortas, said:

> A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor cancelled by its prurient appeal or patent offensiveness.

Stewart concurred on the basis that Fanny Hill was not hard-core pornography. In doing so, he indicated what he considered hard-core pornography to be. His definition referred to sexually explicit photographs "with no pretense of artistic value" and written material "with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value."[129] This demonstrates that the result of Stewart's test would be very similar to the three element test of Brennan. Adding the consistent repudiation by Black and Douglas

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127. *Id.* at 197.

128. 383 U.S. 413, 419–20 (1966).

129. Ginzburg v. United States, 383 U.S. 463, 499 n.3 (1966) (Stewart, J., dissenting). This dissent was the basis for Stewart's concurrence in the *Memoirs* case, 383 U.S. at 421.

of any law suppressing obscenity there were six justices who would reverse a conviction if any of the three elements of obscenity were missing.

Simultaneously with the adoption of the three element test of obscenity a new concern was added. The Court ceased looking only to the book itself and began to focus on the reader and the manner of sale. In *Mishkin v. New York*[130] the Court held that, with respect to the "prurient appeal" portion of the test, consideration should be given to the group for whom the material was designed and not just to the average person for whom such obscene materials would have no appeal: "We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of sexual interests of its intended and probable recipient group. . . ."[131] Thus, sado-masochistic material was held obscene although it might not appeal to the prurient interest of the average reader.

The focus on the reader similarly explains *Ginzburg v. United States*,[132] wherein the Court assumed that the materials would not have been obscene standing alone, but found publisher Ralph Ginzburg properly convicted because his method of selling the materials was "pandering." The concept seems to be that the ideological value of the work is lost because persons reading or looking at it as a result of the sales technique are not going to be concerned with ideas.

> The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material. And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality — whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity.[133]

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130. 383 U.S. 502 (1966).

131. *Id.* at 509.

132. 383 U.S. 463 (1966).

133. *Id.* at 470. For several years after *Ginzburg* and prior to the decision in Miller v. California, 413 U.S. 15 (1973), the Court disposed of most obscenity convictions with a per curiam reversal, noting that the members of the Court disagreed on the appropriate standard to be applied, but finding the material in question not obscene under any standard held by any member of the Court. *See, e.g.*, Redrup

The Court's concern with the nature and the purpose of the *audience* (as opposed to its concern merely with the nature of the *material*) was again made apparent in *Ginsberg v. New York*[134] when the Court upheld the conviction of a drug store operator for violating a New York statute that prohibited the sale of sexually explicit material to minors. In fact, the Court quoted from *Mishkin*: "[The statute] simply adjusts the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of sexual interest. . . .' of such minors."[135] The Court in *Ginsberg* went on to find that because obscenity was not protected speech, sustaining the prohibition "requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors."[136] This analysis is, however, slightly circular, for it is first necessary to find that the articles are obscene before they are without constitutional protection, and yet the Court stated, "The 'girlie' picture magazines involved in the sales here are not obscene for adults."[137] Thus, central to the *Ginsberg* opinion is the idea that certain material which may have redeeming social importance for adults or be within contemporary community standards for them has no such importance for children and is patently offensive as to them. The reason for this may be the unstated assumption that during the sexual awakening of adolescence materials which are sexually explicit will predominantly arouse sexual interest rather than appeal to the intellect.

At one point it appeared that the Court might invalidate all obscenity laws. In *Stanley v. Georgia*,[138] the Court reversed the con-

v. New York, 386 U.S. 767 (1967). Among the materials thus protected were moving pictures of a disrobed woman feigning self-induced satisfaction. California v. Pinkus, 400 U.S. 922 (1970), *aff'g by an equally divided Court*, Pinkus v. Pitchess, 429 F.2d 416 (9th Cir. 1970) (Douglas, J., not participating). However, none of the reversals involved explicit scenes of intercourse focusing on the genitals or pictures of male masturbation, though both male and female nudity and simulated lesbian activity were included in materials held not obscene. *See* I.M. Amusement Corp. v. Ohio, 389 U.S. 573 (1968), *rev'g* State v. I.&M. Amusements, Inc., 10 Ohio App. 2d 153, 226 N.E.2d 567 (1966); Central Magazine Sales Ltd. v. United States, 389 U.S. 50 (1967), *rev'g*, United States v. 392 Copies of a Magazine Entitled "Exclusive," 373 F.2d 633 (4th Cir. 1967); Potomac News Co. v. United States, 389 U.S. 47 (1967), *rev'g* United States v. 56 Cartons Containing 19,500 Copies of a Magazine Entitled "Hellenic Sun," 373 F.2d 635 (4th Cir. 1967); Shackman v. California, 388 U.S. 454 (1967).

134. 390 U.S. 629 (1968).

135. *Id.* at 638.

136. *Id.* at 641.

137. *Id.* at 634 (citation omitted). The Court has long held that it is impermissible to use standards appropriate for juveniles to ban books for adult use. *See* Butler v. Michigan, 352 U.S. 380 (1957).

138. 394 U.S. 557 (1969).

viction of a man who had in his house hard-core pornographic films assumed to be of no social merit. Justice Marshall analyzed the interests of the State in regulating pornography and found most of them inadequate. He condemned the notion that the State has the right to control the moral content of a person's thoughts as "wholly inconsistent with the philosophy of the First Amendment."[139] He also found unsatisfactory the claim that obscenity could be prohibited to prevent crimes, quoting Brandeis: " '[A]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law . . . .' "[140] The dangers which Marshall saw as valid concerns were "the danger that obscene material might fall into the hands of children, see *Ginsberg v. New York, supra,* or that it might intrude upon the sensibilities or privacy of the general public."[141]

The Court soon made it clear, however, that *Stanley* only applied to private possession of obscenity within a person's home. In *United States v. Reidel,*[142] the Court reaffirmed the *Roth* line of cases in upholding the conviction of Mr. Reidel for mailing obscene matter. Justice Marshall concurred specially on the grounds that distribution through the mail did not adequately assure that the materials were not being sent to minors. In *United States v. Thirty-Seven Photographs,*[143] the Court held that Congress could forbid the importation of obscene materials for commercial distribution. Justice White joined by Chief Justice Burger and by Justices Brennan and Blackmun indicated that Congress could ban importation even for private use. Justice Harlan found it unnecessary to reach the latter question because the materials involved were admittedly for commercial distribution. Justice Stewart concurred on the basis that the materials involved were intended for commercial distribution, but stated that *Stanley* forbade seizure of obscene materials imported for private use. Justice Marshall dissented in an opinion applicable to both *Reidel* and *Thirty-Seven Photographs*[144] on the basis that no commercial distribution had yet taken place, and that the government's interest in suppressing obscenity arose only at that point, if ever. Black and Douglas dissented in both cases, arguing, as they had before, that the government had no right to suppress obscenity.

139. *Id.* at 566.

140. *Id.* at 566–67, *quoting* Whitney v. California, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring). The best research to date has not proven that any antisocial conduct arises from looking at obscene works. THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY (1970).

141. 394 U.S. at 567.

142. 402 U.S. 351 (1971).

143. 402 U.S. 363 (1971).

144. 402 U.S. at 360.

Recently a new alignment on the Court succeeded in redefining the standards enunciated in *Roth,* producing for the first time since that case a majority that agrees on a single standard. In *Miller v. California*[145] Chief Justice Burger joined by Justices White, Blackmun, Powell and Rehnquist held:

> [W]e now confine the permissible scope of such regulation [of obscene materials] to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portrays sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value.

The first part of the Court's standard — works which depict or describe sexual conduct which is specifically defined by the applicable state law — is designed to eliminate the due process problem of vagueness. However, as Justice Douglas' dissent indicates, the remaining three criteria — prurience,[146] offensiveness, and lack of serious value — preserve uncertainty in the application of obscenity legislation.[147] The Court tried to meet this criticism in *Miller* by offering "a few plain examples" of what a state statute could prohibit: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." These phrases clearly encompass certain acts whose portrayal could be proscribed with sufficient particularity to meet the Court's requirement of specific definition.[148] Any explicit representa-

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145. 413 U.S. 15, 24 (1973).

146. The requirement of appeal to the prurient interest is taken from *Roth* and should be understood to include the clarifications with respect to deviant groups in *Mishkin* and juveniles in *Ginsberg. See* notes 130 & 135 and accompanying texts *supra.*

There remains the problem of works which contain only a few instances of explicit sexual conduct interspersed in what is otherwise a non-sexual piece. Courts may still find that the quality and intensity of the sexual passages outweigh the longer and perhaps duller remainder of the work. This finding is particularly likely where the sexual episodes are mere adjuncts to the other expression, *see* Wagonheim v. Maryland Bd. of Censors, 255 Md. 297, 258 A.2d 240 (1969), *aff'd by an equally divided Court sub nom.* Grove Press, Inc. v. Maryland State Bd. of Censors, 401 U.S. 480 (1971) (Douglas, J., not participating) involving the film "I Am Curious Yellow," or where the work is sold through advertisements emphasizing the sexual portions of the work, *see* Ginzburg v. United States, 383 U.S. 463 (1966).

147. 413 U.S. at 37.

148. The phrases "ultimate sexual acts" and "lewd exhibition" are not entirely clear, of course, but it seems a reasonable supposition that at a minimum they include sexual intercourse and the fondling of exposed genitals respectively. The other

tion or description of the above acts would appear to be sufficient for a finding of "appeal to the prurient interest."

Patent offensiveness is to be determined by the jury using local community standards rather than an abstraction of national standards.[149] This results in a subjective determination by the jury as representatives of the community of the offensiveness of the material.[150] Thus a judge can ban the film *Deep Throat* in Baltimore[151] while a jury in Bing-

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phrases — "masturbation" and "excretory functions" — more clearly denote specific conduct and probably need no interpretation.

149. The local community in *Miller* was the state of California, but the Court's opinion left open the possibility of using the local standards of smaller communities for city or county obscenity laws. *Cf.* Hamling v. United States, 418 U.S. 87 (1974).

The use of local communities to some extent mirrors the approach first taken by Justice Harlan dissenting in *Roth* and concurring in Alberts v. California, 354 U.S. 476, 496 (1957). He argued that there should be stricter standards for federal than for state censorship of obscene materials.

> [I]t seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books.

Id. at 506. This dual standard for obscenity purposes was also advocated by Chief Justice Burger and by Justice Blackmun who joined Justice Harlan in dissenting from per curiam reversals of obscenity cases. *See, e.g.*, Hoyt v. Minnesota, 399 U.S. 524 (1970). The use of local community standards for judging patent offensiveness as approved by the majority in *Miller* goes far towards accomplishing this result without expressly stating that dual standards are constitutionally proper.

150. A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law.

Hamling v. United States, 418 U.S. 87, 104–05 (1974). A note of irony is found in this case: the material involved was an advertisement for THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY; it had been illustrated by the private publisher with obscene pictures.

The fallacy of using the local community standard was suggested in a parody published by Stein and Day:

> [T]he genius of the local jury is that it does not apply the local community standard as reflected in the actual behavior of the people. Rather, the local jury applies the *expected or anticipated moral standard.* This anticipated moral standard is that which each member of the jury thinks other members of the jury expect him to possess. Thus, when a prosecutor represents a piece of smut to the jury for consideration, it would be highly unlikely that, presented with material so characterized by the prosecutor, the jury would ever decide to the contrary; it is simply unlikely that any man or woman in the jury room would be brazen enough to suggest that his moral standards are so lax that he would permit himself or his children to read or look at smut, the actual facts notwithstanding.

ANONYMOUS, THE OBSCENITY REPORT 110–11 (Stein & Day 1970).

151. Mangum v. State's Att'y, 275 Md. 450, 341 A.2d 786 (1975).

hamton, New York, finds it not obscene.[152] A jury finding that material appeals to the prurient interests and portrays sexual conduct in a patently offensive way is not likely to be subject to serious challenge if the material contains a large amount of depiction or description of the conduct specifically defined by the statute.[153] But the Court has demonstrated it will curb overzealous juries by tying them to a specific definition of obscene acts. In *Jenkins v. Georgia*[154] the Court reversed the conviction for distributing obscene materials of a theatre manager who showed the film *Carnal Knowledge*:

> Our own viewing of the film satisfies us that "Carnal Knowledge" could not be found under the *Miller* standards to depict sexual conduct in a patently offensive way. . . . While the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including "ultimate sexual acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition of the actors' genitals, lewd or otherwise, during these scenes.

The concurring justices objected that the majority's test in *Miller* was shown by *Jenkins* to require just as much judicial supervision as before and thus is unfair because no one can be sure an item is obscene until the Court says it is. Defendants, they urge, do not have fair warning that they are committing a crime.[155] This concern of the concurring justices is probably exaggerated as respects prurient interest and patent offensiveness. Given the *Miller* Court's "plain examples" of what a state statute may prohibit and the jury's right to apply local standards as to offensiveness, there seems to be a reasonably well-defined set of acts whose portrayal can be proscribed with specificity and which the jury may without fear of reversal find prurient and offensive.[156]

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152. People v. Binghamton Theatres, Inc. (Binghamton City Ct. Dec. 16, 1972) (Gorman, City J.).

153. Once the requisite portrayal of sexual acts is shown, the majority really cares little for the mechanics of the jury finding. It needs assurance that a significant group finds the material offensive enough to suppress, but is not overly concerned by the technicalities of execution. Thus the fact that the trial judge in *Hamling* used a "national" rather than a "local" standard in his charge and excluded some evidence of local feeling did not bother the majority. They merely said that correct instructions would not have changed the outcome. While there is little doubt they were correct in this conclusion, it is surprising to find such disregard for precision in instructions to a jury in a first amendment case.

154. 418 U.S. 153, 161 (1974).

155. *Id.* at 162–65 (Brennan, J., concurring, joined by Stewart & Marshall, JJ.).

156. *See* notes 146–49 & 150–54 and accompanying texts *supra*.

The concurring justices' criticism does have merit as respects the "serious value" standard, however. Although the majority in *Miller* explicitly rejects the criterion of "utterly without redeeming social importance," it does not suggest any refinements for determining when a work, taken as a whole, has "serious" value.[157] The Court must therefore carefully review any decision that material does not have "serious literary, artistic, political or scientific value." It may seem strange that nine aging lawyers should determine serious artistic or scientific value — their past experience is not likely to qualify them for this job.[158] However, there seems to be little choice. If the Court were to permit juries to have the ultimate say on the question of value, the result might be the suppression of ideas which the jury dislikes and thus concludes have no value. On the other hand, if the testimony of experts were conclusive, every pornographer would surely find some critic or scientist to testify for him.[159]

The Court again faced several obscenity problems during the October Term, 1974. In many cases, the Court denied certiorari, with the *Miller* dissenters noting their continuing disagreement with the Court's formulation.[160] The major case which the Court did decide

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157. The "pandering" discussion in *Ginzburg* might shed some light on the problem of "serious value." *See* notes 132–34 and accompanying text *supra*.

158. Few judges, even when approving sexually candid books as not obscene, ever speak enthusiastically of them. "Our own independent examination of the magazines leads us to conclude that the most that can be said of them is that they are dismally unpleasant, uncouth and tawdry." Manual Enterprises v. Day, 370 U.S. 478, 489–90 (1962) (Harlan, J., reversing ruling which barred the mailing of magazines with photographs of nude males). "I find the literature and movies which come to us for clearance exceedingly dull and boring . . . ." Ginsberg v. New York, 390 U.S. 629, 655 (1966) (Douglas, J., dissenting).

> The two magazines that the 16-year old boy selected are vulgar "girlie" periodicals. However tasteless and tawdry they may be, we have ruled (as the Court acknowledges) that magazines indistinguishable from them in content and offensiveness are not "obscene" within the constitutional standards heretofore applied.

Id. at 672 (Fortas, J., dissenting).

159. *See, e.g.*, early advertisements for "The Devil and Miss Jones," offering a collection of critical raves for what is essentially hard core pornography and the testimony of the experts in the trial of "Deep Throat."

It is not yet clear how far the Court will go in examining "serious literary, artistic, political or scientific value." Presumably this criterion will save the collections of the Kinsey Institute, but the Court may look askance at films with explicit sex scenes directed at the general public regardless of their advertisements; witness the cold reception "I Am Curious Yellow" received in the Supreme Court, Grove Press, Inc. v. Maryland State Bd. of Censors, 401 U.S. 480 (1971).

160. *See* Adult Book Store v. Sensenbrenner, 421 U.S. 924 (1975); Art Theater Guild, Inc. v. Ewing, 421 U.S. 923 (1975); Atheneum Book Store, Inc. v. Miami Beach, 420 U.S. 982 (1975); Ballew v. Alabama, 419 U.S. 1130 (1975); Dachsteiner v. United States, 421 U.S. 954 (1975); Dyke v. Georgia, 421 U.S. 952 (1975); Fornaro v. Maryland, 419 U.S. 1126 (1975); Pierce v. Alabama, 419 U.S. 1130 (1975); Pryba

involved a limitation on the context in which certain speech occurred. The city of Jacksonville prohibited the showing at drive-in theatres of any pictures where nudity was portrayed. Assuming that the pictures themselves are constitutionally protected speech, the city expressed through the statute its concern that minors and others outside the theatre would see such nudity. On analogy to indecent exposure laws, the governmental interest alleged was not stopping speech, but prohibiting certain conduct (nudity) in specified places. In *Erznoznik v. City of Jacksonville*,[161] the Court struck down such legislation.

The Court distinguished public nudity ordinances on the grounds that nudity in a picture must be considered as a portion of an entire expressive work whereas public nudity is normally an isolated incident. It could further have distinguished most public nudity cases on the basis that the conduct is engaged in for the purpose of shocking or offending others and can be analogized to the "fighting words" doctrine. The revelation of nudity to persons who might be shocked is wholly incidental at a drive-in, however, and occurs simply because of the expense involved in shielding such screens from possible observance by persons other than theatre patrons. The Court pointed out that the effect of the Jacksonville ordinance was to suppress movies with "any nudity however innocent or even educational."[162]

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v. United States, 419 U.S. 1127 (1975); Ridens v. Illinois, 421 U.S. 993 (1975); S.S. & W., Inc. v Kansas City, 421 U.S. 925 (1975); Sykes v. Maryland, 419 U.S. 1136 (1975); Ayre v. Maryland, 419 U.S. 1073 (1974); Blank v. California, 419 U.S. 913 (1974); Cangiana v. United States, 419 U.S. 904 (1974); Goldstein v. Virginia, 419 U.S. 928 (1974); Groner v. United States, 419 U.S. 1010 (1974); Isola v. United States, 419 U.S. 933 (1974); Kaplan v. California, 419 U.S. 915 (1974); Marshall v. Ohio, 419 U.S. 1062 (1974); New Orleans Book Mart, Inc. v. United States, 419 U.S. 1007 (1974); Price v. Virginia, 419 U.S. 902 (1974); Sulaiman v. United States, 419 U.S. 911 (1974); Tobalina v. California, 419 U.S. 926 (1974); Van Gundy v. United States, 419 U.S. 1004 (1974); Winslow v. Virginia, 419 U.S. 906 (1974).

In an opinion applicable to all these cases, Justices Brennan, Marshall, and Stewart stated that, in accordance with their views in *Miller* and *Hamling*, they would reverse the decisions. Justice Douglas also filed a separate opinion in these cases stating his views to the same effect. These justices did not, however, insist on hearing the cases, since it would only result in wasting time in view of the position of the other five justices. The number of these cases suggests the flood of decisions with which the Court is presented for application of its obscenity rules, and the steady notation of dissents indicates the vigor with which the dissenters press their view that the Court should get out of the business by holding the material to be constitutionally protected rather than by ducking the issue. As noted in the text, the denial of certiorari is disturbing because it leaves obscenity determinations in the hands of juries who may be more concerned with community morals than with preserving freedom of expression.

161. 422 U.S. 205 (1975).

162. *Id.* at 211.

The Court carefully analyzed the rationales for the state prohibition and found them defective. The protection of the public from shock or offense was held to be an impermissible governmental objective because the shock effect is inextricably bound up in the expression of ideas and the right to protect against the shock becomes the ability to suppress the idea. The argument that the ordinance was necessary to protect the privacy of the individual was rebutted by the suggestion that the viewer can avert his eyes.[163] The third interest offered by the city in support of its statute was the protection of minors. To this the Court replied that even if the obscenity standards for juveniles under *Ginsberg* differed from those for adults, a total proscription of all nudity goes beyond what would be considered obscene for children; the ordinance was overbroad as a protection of juveniles. The last interest asserted was that of traffic control. The ordinance, however, applied to movies which could be seen in any public place, not merely to those which could be seen from the street. Further, in only banning nudity, it did not deal with other kinds of visual images on the screen which could be equally distracting to motorists. This combination of overinclusiveness and underinclusiveness indicated that protection of motorists was not the state interest protected. The Court did indicate, however, that an ordinance requiring the screening of all drive-in movies from the view of motorists might be a constitutional traffic regulation.[164] The majority thus saw the statute as an attempt to limit the expression of ideas involving nudity and found this to be an invalid governmental purpose.

The dissent of Justices Burger and Rehnquist focused on the captive audience argument. They argued that a drive-in movie screen is much more intrusive than other media of speech and cannot easily be avoided by "averting the eyes." While the majority focused on the expression intended by the filmmakers, the dissent argued that persons outside the theatre could not hear the movie and that a prohibition directed at films visible to non-patrons could not, therefore, be an attempt to stifle ideas as to those persons. The dissenters said that the state regulation of the manner in which the films could be shown was not an attempt to regulate ideas but an attempt to deal with a harm unrelated to the expression of ideas.[165]

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163. Justice White dissented primarily on the basis that he saw the exhibition of nudity as conduct and feared the Court's decision would apply to public indecency ordinances as well. While it is true that arguments directed to the audience's ability to avert their eyes would also apply to indecent exposure ordinances, the other distinctions brought out by the majority should suffice to uphold indecent exposure laws.

164. 422 U.S. at 215 n.13. The Court also indicated that ordinances designed to protect persons in their homes from such theatres would be appropriate. *Id.* at 212 n.9.

165. *Id.* at 218.

On the other hand, the majority found a significant impact on the expression of ideas which was not necessary to further the purposes unrelated to suppression of ideas. The crucial difference between it and the dissent appears to be one of appreciation for the intrusiveness of such drive-in movies on the right of the individual to avoid being forced to view or listen to another's expression.

Throughout this recital of the development of the Court's theories on obscenity, it has been clear that the majority has never considered hard-core pornography to have constitutionally protected value. Obscenity purportedly produces a physical reaction (lust) rather than a reasoned and reasoning response.[166] Lust may be enjoyable and indispensible to human survival, but it is not one of the values normally involved in speech or expected to be enshrined in the protection of the first amendment. If lust is not thus protected, legislatures may forbid appeals to lust within the bounds of the due process clause. "Where communication of ideas, protected by the First Amendment, is not involved, . . . the mere fact, as a consequence, some human 'utterances' or 'thoughts' may be incidentally affected does not bar the State from acting to protect legitimate state interests."[167] Still, the sexual emotion is tied very closely to ideas about sex, and obscenity laws, given a loose interpretation, could easily be used to suppress unorthodox ideas. The "predominant appeal" test of *Roth* as elaborated in *Miller* is an effort to assure that obscenity legislation is aimed at only those materials whose significance lies in evoking physical response rather than in stimulating reasoning facilities.[168] This is analogous to the "fighting words" requirement that words be calculated to arouse to anger. The purpose

166. Several other forms of speech may be thought to appeal to physical rather than mental responses — humor results in laughter, and demogoguery in increased adrenalin combined with specific emotions. On analysis most of these forms of speech depend on mental processes and perceptions which require the audience to place the speech in the context of some wider knowledge. For example, humor is often a product of the contrast of unlikely with expected behavior. Knowledge and consideration of what constitutes proper behavior is necessary to trigger the response of laughter. Other emotions similarly seem to be triggered by an intellectual thought process involving a chain of ideas. Sexual excitement, however, may be more directly physical.

167. Paris Adult Theatre v. Slaton, 413 U.S. 49, 67 (1973).

168. Sexual conduct is not usually undertaken with the purpose of expressing an idea. If the conduct is accidentally observed by someone else, that does not change the act into expression. In certain circumstances the observer may be willing to pay to observe such action. Even if the actors accept money, they may yet have no purpose to express ideas. If the actors are filmed and the film is shown, there still may be no intent to express an idea in that film. However, in those situations where the actors are aware of the audience, they may have an expressive purpose as well. Thus, a "predominant appeal" test is needed to assure that the concern of the law is with appeal to lust and not to ideas about sex.

of that requirement is to distinguish between words whose significance lies in inflicting injury and words that express ideas.[169] The Court is striving to isolate a non-ideational harm with which the legislature may deal while giving some degree of protection to interrelated ideas.

Justice Brennan, dissenting with Justices Stewart and Marshall in *Miller* and its companion cases, repudiated not only the Court's new standards but also the old *Roth, Jacobellis, Memoirs, Ginzburg,* and *Ginsberg* standards for which he was largely responsible. He first argued that an attempt to define obscenity as a class of speech outside the protection of the first amendment is doomed to be unconstitutionally vague:[170]

> Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as "prurient interest," "patent offensiveness," "serious literary value," and the like. The meaning of these concepts necessarily varies with the experience, outlook and even idiosyncracies of the person defining them.

If the author cannot tell whether his work is constitutionally protected until after a Supreme Court decision on it, he has not received sufficient warning that his conduct was proscribed by the statute. Further, vague standards will deter individuals from engaging in speech which ultimately might be found protected.

The fact that obscenity legislation may suppress ideas does not of itself determine for Brennan, as it did for Douglas, the constitutionality of obscenity legislation. Instead, Brennan looks further to decide whether there is a legitimate state purpose behind the legislation. "Given these inevitable side effects [lack of fair notice, deterrence of protected speech and institutional difficulties for the Court] of state efforts to suppress what is assumed to be *unprotected* speech, we must scrutinize with care the state interest that is asserted to justify the suppression."[171]

At least with respect to selling obscene material to adults who desire it, only two state interests are asserted, according to Brennan.[172] The first is that obscenity leads to the commission of crime. But if we apply the "clear and present" danger standard normally applicable to incitement to unlawful action, legislation based on this interest cannot stand. The danger is not "clear" for there is little empirical evidence that obscenity does lead to crime.[173] Even if it were "clear," it is not "present" for there is time to use the deterrents of further education and

169. *See* notes 63–120 and accompanying text *supra.*
170. 413 U.S. at 84.
171. *Id.* at 103.
172. *Id.* at 107–13.
173. THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY (1970).

punishment for the commission of crime. The second state interest is to improve the moral tone of the community. To use the majority's words, "[T]he sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex."[174] In effect, this argument finds obscenity evil because it causes persons to have particular ideas about sexual relations and those ideas are considered undesirable. While the government may possibly attempt to promote existing ideas of morality, it cannot do so by suppressing opposing views. Since obscenity legislation directed at sale to consenting adults is not based on any legitimate state interest unconnected with the suppression of ideas, Brennan concludes it is unconstitutional.[175]

The majority's response is that the legislation is not aimed at speech understood as rational discourse but material which operates at a non-rational level. The definition is as narrow as possible. If more precision is demanded, the state will be unable to legislate at all in the area, even where, in fact, it has no intention of suppressing ideas.

> The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. . . . But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.[176]

Again, the differences on the Court do not reflect disagreement on the basic concept of the first amendment. They only reflect a disagreement as to the possibility and method of assuring that the government is not trying to suppress ideas about sexual conduct in its obscenity legislation. The majority would permit legislation which is drawn as narrowly as possible to focus on non-speech as the majority defines it. The dissenters emphasize the potential for suppressing ideas and see the other state interests to be vindicated as minimal; they would, therefore, forbid obscenity legislation directed at consenting adults.

Libel, "False Light" and Invasion of Privacy

"Sticks and stones may break my bones, but names will never hurt me."

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174. Paris Adult Theatre v. Slaton, 413 U.S. 49, 63 (1973).
175. *See id.* at 112-13.
176. Miller v. California, 413 U.S. 5, 34-35 (1973).

The childhood nursery rhyme simply is not true. A bad name can destroy a person's life. Libel causes harm as a result of the reaction of the listener towards a third party, but unlike solicitation and incitement offenses, it is illogical to punish the acts of the listeners. Thus unless the libellor can be held liable, an injury will be inflicted for which there will be no legal recourse. The nature of the injury inflicted is that people believing the libel will treat the person libelled with less respect and give him fewer opportunities for social, political and economic advancement. Where the statements made concerning an individual's character and actions are true, however, it is at the heart of the democratic process to permit the infliction of such injuries.

In one rather special case the Supreme Court did allow a state to prohibit comment which injured reputation without allowing proof of truth as a defense. In *Beauharnais v. Illinois*,[177] a closely divided Court upheld the conviction of a pamphleteer who wrote, "If persuasion and the need to prevent the white race from being mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will." *Beauharnais* is itself a mongrel between libel and "fighting words." The defendant did not direct his words to a single individual with the intent of provoking an immediate physical reaction, yet like "fighting words" there was at least a vague expectation that members of the class aspersed would feel themselves injured and would react violently. The Illinois "group libel" law did not allow truth alone as a defense, but did permit truth published with good motives and justifiable ends to serve as a defense. The crux of the crime was not the words spoken, but the maliciousness with which they were uttered. Thus, even here, the Court's decision may be viewed as upholding the law because the law was directed at an injury rather than at the content of the ideas which caused the injury. The ideas might still be expressed, but in the context of a discussion seeking rational ways of meeting society's problems and not in a vituperative harangue.

Allowing the Court to choose "good motives and justifiable ends" may be very dangerous for speech. Beauharnais himself did not use the language solely to affront Negroes; he was using it to encourage other people to have certain ideas about Negroes and about what society should do with respect to Negroes. The ideas may be despicable, but they were intended to be treated as ideas. The Court has never again faced the issue of group libel, but it is unlikely that *Beauharnais* would

177. 343 U.S. 250, 252 (1952).

command much support today.[178] The first assumption of the Court in *Beauharnais* was that pursuant to the language of *Chaplinsky*,[179] libel was not afforded the protection of the first amendment. This assumption glossed over the problems of defining libel consistently with the first amendment, and the Court subsequently indicated that such definition is a major problem.

"[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."[180] With these words, the Supreme Court launched its first full consideration of the compatibility of libel law with the first amendment. In *New York Times Co. v. Sullivan*,[181] the Court reversed a libel judgment against the New York Times for carrying an advertisement which contained several misstatements of fact. The Court referred to "the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[182] Consequently, the Court held that:[183]

> The Constitutional guarantees require, we think, a federal role that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Libel, at least for public officials, consists then of a false defamatory statement made with "actual malice." The term "actual malice" is somewhat misleading. The speaker need not bear any ill-will towards the person defamed. The requirement is only that the words spoken be false and that the speaker either know they are or act in reckless disregard of whether they are. Perhaps a better phrase would be "intentionally false" statements using intent in its tort law sense of knowledge of consequence or reckless disregard of consequence.[184] Such

178. *See* EMERSON, *supra* note 17, at 396–97; H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 7–64 (1966).

179. Chaplinsky v. New Hampshire, 315 U.S. 568 (1962), discussed at note 62 and accompanying text *supra*.

180. New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

181. *Id.*

182. *Id.* at 270.

183. *Id.* at 279–80.

184. *See* W. PROSSER, THE LAW OF TORTS § 34, at 184–85 (4th ed. 1971).

"intentionally false" statements are outside the first amendment and are therefore punishable:[185]

> Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . ." *Chaplinsky v. New Hampshire* . . . . Hence the *knowingly* false statement and the false statement made *with reckless disregard of the truth,* do not enjoy constitutional protection.

But the false statement innocently made does need protection. The government through its courts is the arbiter of truth in society; if the government can punish *any* critical comment that is false, it has the power to suppress dissent by finding dissenting ideas false. This power may operate at any of three levels. First, the direct criticism of governmental policy may be suppressed. Second, government officials normally believe that their decisions and views are supported by facts. Disagreement over the existence of those underlying facts serves to attack governmental policies. If the government may punish persons for making any false statements, it may tend to find statements disagreeing with the facts as it finds them to be false. On yet a third level, the government might use factual misstatements wholly unrelated to governmental policy as a device for jailing persons it finds distasteful because critical of government policies.[186] Such power, at any level, is inconsistent with a system of freedom of expression which presupposes that people will be able to choose from competing ideas those *they* believe to be true. Furthermore, even if the government were somehow not the arbiter of truth, the requirement of truth in speech would still place upon the speaker the burden of proving truth. The difficulty and cost of meeting this burden could alone easily deter a potential speaker from making a statement he believed to be true. Thus, unless innocent falsehoods are protected, valid criticisms of governmental conduct may be stifled.[187] The calculated falsehood, however, needs no such protection. As long as the populace is aware that it is the calculation and not the falsity that exposes one to punishment, the innocent speaker will not be deterred from saying what he believes to be true. The Court need focus only on the knowledge of the speaker and not on the truth of his statement or the quality of his ideas.

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185. Garrison v. Louisiana, 379 U.S. 64, 75 (1965) (emphasis added).

186. The history of the Alien and Sedition Act demonstrates the abuses to which such power is subject. *See* J. SMITH, FREEDOM'S FETTERS (1956).

187. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

Again the Court is concerned with the elimination of an evil by means which are not directed to the content of the words.[188]

The likelihood that the law is directed at conduct rather than at suppressing ideas may vary according to the status of the person allegedly libelled. Justice Harlan, writing for a plurality in *Curtis Publishing Co. v. Butts*,[189] saw a difference in the standard of recovery to be applied where the libel involved a well-known person who was not a public official: "Neither plaintiff has any position in government which would permit a recovery by him to be viewed as a vindication of governmental policy." Thus, Harlan seemed confident that the government was not attempting to suppress ideas when it allowed a nongovernmental public figure to recover for libel on the basis that the statement was not only false but showed an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers. Conversely, Harlan's statement implies his belief that where government policy is involved, there is a need for a stricter standard to be sure that the law is not being used as an instrument to suppress heretical ideas.

A majority of the justices disagreed with Harlan's distinction between public officials and public figures. As Chief Justice Warren said:[190]

> [A]lthough they are not subject to the restraints of the political process, "public figures," like "public officials," often play an influential role in ordering society. And surely as a class these "public figures" have as ready access as "public officials" to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of "public officials."

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188. The focus on conduct was explicitly stated by Justice Harlan in considering the libel of public figures:

> [N]either the interests of the publisher nor those of society necessarily preclude a damage award based on improper conduct which creates a false publication. It is the *conduct element,* therefore, on which we must principally focus if we are successfully to resolve the antithesis between civil libel actions and the freedom of speech and press. Impositions based on misconduct can be neutral with respect to content of the speech involved, free of historical taint, and adjusted to strike a fair balance between the interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood.

Curtis Publishing Co. v. Butts, 388 U.S. 130, 152–53 (1967) (plurality opinion) (emphasis added).

189. *Id.* at 154. *See also* note 180 *supra.*

190. *Id.* at 164.

Nevertheless, Harlan's point that allowing certain libel actions would not appear to be motivated by a desire to suppress criticism has some weight with respect to libel actions brought by private individuals. The Court's first venture in this area, however, was colored by the fact that the private person libelled was involved in a matter of public concern and the case, *Rosenbloom v. Metromedia, Inc.*,[191] resulted in an extension of freedom of speech. Justice Brennan, joined by Chief Justice Burger and Justice Blackmun declared, "We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[192]

Defendants in *Rosenbloom* had broadcast reports of a police raid of petitioner's home in search of obscene books. The broadcasts referred to Rosenbloom's books as obscene and characterized his business as "the smut literature racket." Rosenbloom was acquitted of criminal obscenity charges. He then filed an action for libel. Justice White, concurring in *Rosenbloom,* carefully limited his opinion to the situation present in that case:[193]

> [A]bsent actual malice as defined in *New York Times Co. v. Sullivan,* the First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view.

Subsequently, in *Gertz v. Robert Welch, Inc.*,[194] the Court abandoned Brennan's plurality opinion in *Rosenbloom* and elevated to majority status the dissent of Stewart and Marshall in that case.[195] The two new justices, Powell and Rehnquist, joined Stewart and Marshall

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191. 403 U.S. 29, 43-44 (1971).

192. Justice Brennan expressly left open the definition of "public or general concern" for determination in future cases. Since newspapers try to print only matters of interest to the general public, arguably every article or statement in a newspaper is of "general concern." Justice Brennan, however, might possibly have meant something different by the phrase "general concern"; it could refer more specifically to matters about which legislation is presently being dicussed as well as to the performance of public officials. Another possibility is derived from Justice Brennan's reference in his footnote 17 to Professor Emerson. Emerson has argued that a limited number of "personal and intimate details of one's life," such as childbirth and sexual intercourse, should be protected from exposure, but that everything else should have no protection. EMERSON, *supra* note 17, at 557.

193. 403 U.S. at 62.

194. 418 US. 323 (1974).

195. 403 U.S. at 78-87.

in an opinion written by Justice Powell. They returned to the pre-*Rosenbloom* distinction between the public official or public figure and the private individual. Public persons, Powell argued, are better able to defend themselves than private persons. The private individual needs outside protection.[196] Further, society has an interest in the actions and personal attributes of public officials and public figures. Individuals who become public officials or public figures do so knowing that they are exposing themselves to intense scrutiny and may in some measure be assumed to expose themselves to the increased risk of defamatory falsehoods. Private individuals have not done so, and thus are "more deserving of recovery."[197] As to them, recovery should be possible for *negligent* falsehoods. Powell refused to apply strict liability for falsehoods about private persons. He expressed a concern that strict liability would be too onerous and intimidating to the news media, but it is possible that the justices wanted to reassure themselves that the focus of the law is on conduct — negligence — rather than on the truth of statements or the quality of ideas. The *Gertz* Court also precluded punitive damages for libel unless "actual malice" as defined in the *New York Times* case is shown. Again the limit is imposed to assure that the press will not be deterred by the fear of damages assessed in retribution rather than compensation.[198] Punitive damages are not necessary to redress the harm and therefore might be motivated by a desire to suppress speech.

One notable development in *Gertz* is the distinction drawn between facts and ideas. "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact."[199] Under this distinction, the law of libel is directed at suppressing a harm resulting from false statements of fact and not at suppressing ideas. But it may be argued that a statement of fact is really an idea about the existence of that fact. The revolution

196. The reasoning bears a relationship to Justice Harlan's in Curtis Publishing Co. v. Butts, 388 U.S. 130, 154–55 (1967), but is applied to the distinction between public and private persons rather than to that between public officials and public figures.

197. 418 U.S. at 345.

198. But the *Gertz* Court includes pain and suffering in the computation of actual damages. *Id.* at 350. A generous jury could set this at a high rate, reflecting their distaste for the speaker or their disapproval of his ideas. Such an award would be quite difficult to review. The "actual damages" of *Gertz* could thus significantly deter comment. Note that the plaintiff in Time, Inc. v. Firestone, 96 S. Ct. 958 (1976) received $100,000 for personal humiliation, pain, and suffering without pleading any loss to reputation.

199. 418 U.S. 339–40.

of the earth around the sun may be a fact, but an individual's statement that the earth revolves around the sun is an expression of the idea that the fact exists.[200] It may be necessary for designated bodies (such as juries) to determine facts for purposes of making social decisions such as the allocation of criminal responsibility, but it is the antithesis of free speech to prohibit persons from believing or stating that the designated body's determination of fact was incorrect.

The holding of the Court in *Gertz* does not depend on this distinction between fact and idea, for including the concept of negligence in the definition of libel assures that the law is directed at a form of conduct. However, the distinction which Powell draws may indeed be partially responsible for the decision. If the Court realized that all libel law suppresses ideas, it might be more willing to grant the speaker additional protection.

Justice Brennan, in *Rosenbloom,* anticipated the arguments for distinguishing public and private persons:[201]

> Self-governance in the United States presupposes far more than knowledge and debate about the strictly official activities of various levels of government. The commitment of the country to the institution of private property, protected by the Due Process and Just Compensation Clauses in the Constitution, places in private hands vast areas of economic and social power that vitally affect the nature and quality of life in the nation.

To be certain that ideas in these areas are not suppressed by the government, Brennan would require intentional falsehood to be shown in any libel action involving matters of public concern. The concept of libel would remain, however, since under an intentional falsehood standard it would be clear that the speaker was intending to inflict a harm rather than participate in a discussion leading to better understanding of our society. The government is not trying to prevent individuals from having and discussing their ideas but rather from inflicting injury by statements the speaker does not himself believe.

Justices Douglas and Black insisted that no interest should entitle the government to abridge speech under the language of the first amendment, and that even the deliberate falsehood is speech. "[T]he First

200. The gravest abuses of freedom of speech have often been censorship of facts. Galileo was forced to recant by the Church for his heretical assertion that the earth revolves around the sun. 9 ENCYCLOPEDIA BRITANNICA 1089–90 (1970).

201. 403 U.S. at 41. Justice Brennan also pointed out an alternative method for vindicating reputation might be a requirement of retraction or a suit for failure to retract upon the presentation of sufficient evidence that a statement was false. *See* Note, *Vindication of the Reputation of a Public Official,* 80 HARV. L. REV. 1730, 1739–43 (1967).

Amendment was intended to leave the press free from harassment of libel judgments."[202] The two Justices further point out that the fact-finding process is hardly foolproof. Juries may find actual malice in cases where the publisher felt sure that his statement was correct. "Such a requirement is little protection against high emotions and deep prejudices which frequently pervade local communities where libel suits are tried."[203] Fear of the possibility of an erroneous jury finding of "intentional falsehood" may also deter speakers from making statements which are in fact true and which the speaker believes to be true.

This term the Court further refined its distinction between public figures and private persons in *Time, Inc. v. Firestone*.[204] The Court held that the report of the divorce decree of a prominent socialite was not subject to the *New York Times* standard of "actual malice," but merely to a standard of negligence. Justices Burger,[205] Blackmun,[206] Powell and Stewart[207] joined Justice Rehnquist's opinion which held that the plaintiff was not a public figure as she "did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of

202. Curtis Publishing Co. v. Butts, 388 U.S. 130, 172 (1967) (Black, J., joined by Douglas, J., concurring and dissenting). *See also* Gertz v. Welch, 418 U.S. 323, 355 (1974) (Douglas, J., dissenting).

203. Rosenblatt v. Baer, 383 U.S. 75, 95 (1966) (Black, J., joined by Douglas, J., concurring in the reversal but dissenting from leaving the case open for a new trial).

204. 96 S. Ct. 958 (1976).

205. Chief Justice Burger's views are somewhat enigmatic. He joined the plurality in *Rosenbloom* finding speech protected by an actual malice standard and in *Firestone* finding it protected only by a requirement of negligence, but he dissented in *Gertz* where he urged strict liability for the libel of private persons. He commented caustically on the *Gertz* standard: "I would prefer to allow this area of the law to evolve as it has up to now with respect to private citizens rather than embark on a new doctrinal theory which has no jurisprudential ancestry." Gertz v. Robert Welch, Inc., 418 U.S. 323, 355 (1974).

206. Justice Blackmun, like Chief Justice Burger, had joined the plurality opinion in *Rosenbloom*, but he concurred in *Gertz*, stating, "If my vote were not needed to create a majority, I would adhere to my prior view. A definitive ruling, however, is paramount." *Id.* at 354. Blackmun's abnegation underscores the problems of plurality opinions. *See* Davis & Reynolds, *Judicial Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59.

207. Justice Powell, joined by Justice Stewart, wrote a concurring opinion to indicate that the record did not show negligence. If the remaining justices were, by remanding, indicating their willingness to affirm libel judgments where evidence of negligence is as scant as that in *Firestone*, Justices Powell and Stewart may be forced to rethink their position. They may be led to adopt the more explicit standard Justice Harlan advocated for public figures in *Butts* — "an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *See* text accompanying note 189 *supra*.

the issues involved in it."[208] The case was remanded for determination on the question of negligence.

Justice Marshall, in dissent, agreed that private persons could recover in libel actions on a showing of negligence, but argued that Mrs. Firestone was a public figure. In Marshall's view the majority's conclusion that the divorce proceeding was not a "public controversy" resurrects *Rosenbloom's* application of the *New York Times* standard to matters of "public or general concern." This approach forces the Court to decide what matters are in fact "of public or general concern," or, in effect, what matters are relevant to self-government. Marshall argued in *Firestone,* as in his *Rosenbloom* dissent, that the Court is not an appropriate body to make such an inquiry. Instead, he urged, the focus of analysis should "be on the actions of the individual, and the degree of public attention that had already developed, or that could have been anticipated before the report in question."[209]

Justice Brennan, also dissenting, distinguished *Gertz* on the grounds that it did not involve the reporting of official acts. He would require a standard of "actual malice" as defined in *New York Times* for suits based on the reporting of public judicial affairs.[210]

While Brennan and Marshall would have reversed the decision and found for the defendant, Justice White in his dissent would have affirmed the award to the plaintiff. He returned to the fact-idea distinction mentioned in *Gertz,* reasserting his position from that case that the false statement of fact is not protected speech. He also noted that the *Gertz* rule requiring proof of negligence was designed to prevent the chilling effect strict liability would have on newspapers. Since *Firestone* arose before the decision in *Gertz,* the application of the fault requirement would not further the *Gertz* policy. Therefore, White concluded, the old common law standard of strict liability for false defamatory statements should apply.[211] White's view of the prophylactic nature

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208. 96 S. Ct. at 965.

209. *Id.* at 982. Justice Marshall also found no basis for negligence on the part of Time.

210. *Id.* at 975–78. Justice Brennan did not renounce his position in *Rosenbloom,* but distinguished *Gertz* as not involving the actions of public officials.

211. *Id.* at 979. Justice White had also dissented in *Gertz* on the grounds that the libel of private individuals, unless incidental to the criticism of public officials, should be actionable on a showing of mere falsity. He did not specifically recant his *Rosenbloom* concurrence, but his position in *Gertz* made it apparent that the *Rosenbloom* plurality would not hold. This situation was probably the real impetus for Blackmun's concurrence and Burger's dissent in that case. Neither *Gertz* nor *Firestone* involved criticism of the performance of public officials, so sustaining libel actions in those cases could not be viewed as a vindication of public policy. Justice

of the first amendment libel decisions seems fundamentally unsound, however. The rules were developed to assure that the legislature had a legitimate purpose in enacting the particular statute before the Court. If a libel statute as interpreted by the state courts does not require fault, the likelihood is that the function of the statute is to suppress ideas.[212]

On the present Court, the justices are unanimous[213] that "actual malice" is required for a public official or a public figure to obtain a libel judgment. If a private individual is libelled, Justice White would allow recovery on proof of falsehood; Justices Powell, Burger, Rehnquist, Stewart, Marshall and Blackmun would allow recovery on a showing of negligence but would limit damages to actual damages; Justice Brennan would hold the *New York Times* "actual malice" standard applicable if the libelous statement involved a matter of public concern. The differences among the judges revolve again around a different factual appreciation — this time over what protection is necessary to be certain that the law is not applied to suppress ideas.

Lately, the Supreme Court has dealt with two issues closely related to libel. One is the injury done by false statements which are not defamatory and the second is the injury resulting from true statements making public certain private matters. Shortly after its decision in *New York Times Co. v. Sullivan,* the Court was faced with a civil suit under a New York statute which was interpreted to give a right of action to an individual whose name, picture or portrait is the subject of a "fictitious" report or article. Plaintiff and his family had been held hostage by escaped convicts. That incident, among others, provided the inspiration for a very successful fictional drama. *Life* magazine then staged photos of scenes from the play in plaintiff's former house, implying that the play was a reenactment of plaintiff's experience. Plaintiff claimed that he was injured by the story. The Supreme Court in a plurality opinion, *Time, Inc. v. Hill,*[214] applied the *New York Times* standard of knowing or reckless falsehood to this situation and found the defendants not liable. The opinion of Justice Brennan was joined by Justices Stewart and White. Justices Black and Douglas concurred, urging that no liability could attach even for intentionally false statements. Justice Harlan would have applied a negligence standard, while

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White has not, since *Rosenbloom,* specifically addressed the problem of what standard should govern the libel of private persons when incidental to the criticism of public officials.

212. *See* notes 184–88 and accompanying text *supra.*

213. As of publication, Justice Stevens had not expressed his views on these issues. Accordingly, the discussion refers only to the other justices.

214. 385 U.S. 374 (1967).

Justices Fortas, Warren and Clark dissented on the grounds that the trial court's instructions met the majority standard.

The Court recently decided another "false light" case, *Cantrell v. Forest City Publishing Co.*,[215] but avoided reconsideration of the *New York Times-Hill* standard, holding that the trial court had properly used that standard in finding liability. The judge's finding of no "malice," the Court said, referred not to the *New York Times* concept of "actual malice," but to a state common law requirement that punitive damages would not be allowed in "false light" suits unless there was personal ill will towards plaintiff or wanton and reckless disregard of plaintiff's right of privacy. Thus, a finding of "actual malice" as respects the truthfulness of the statements was not inconsistent with a finding of no "malice" towards the plaintiff.

The Court in *Gertz* had carefully distinguished the *Hill* situation, saying:[216]

> Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential.

Subsequently, however, Justice Powell suggested that *Gertz* may call for a reconsideration of the *Hill* test:[217]

> The Court's abandonment of the "matter of general public interest" standard as the determinative factor for deciding whether to apply the *New York Times* malice standard to defamation litigation brought by private individuals, *Gertz v. Robert Welch* . . . calls into question the conceptual basis of *Time, Inc. v. Hill.*

There is, however, no indication that the Court will allow recovery on a strict liability basis. The analysis of doctrine in *Gertz* would thus also apply here.

Finally, in the recent case of *Cox Publishing Corp. v. Cohn*[218] the Supreme Court tentatively explored the problem of injury from true statements concerning matters of private concern. A Georgia trial court held that the publication of the name of a rape victim was a common law tort. The Georgia Supreme Court affirmed, finding "no public interest or general concern about the identity of the victim of such a crime as will make the right to disclose the identity of the victim rise

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215. 419 U.S. 245 (1974).

216. 418 U.S. at 348.

217. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 498 n.2 (1975) (Powell, J., concurring).

218. *Id.*

to the level of First Amendment protection."[219] The interest which the action was stated to further was the individual's right of privacy.

Individual privacy has long been protected by laws preventing third party access to private spheres — trespass laws in the private sector, constitutional limitations on search and seizure in the public sector. Recently, the Court has found a constitutional base for a right of privacy which prevents governmental interference with certain intimate acts.[220] These rules evidence a concern for protecting certain aspects of an individual's life from exposure to others. The interest in preserving privacy is enhanced in a case like *Cox Broadcasting* because publicity about the identity of rape victims may deter such victims from complaining to the police and might thus aggravate the danger of rape.

Nevertheless, if the interest to be furthered by such privacy laws includes an interest in not having certain matters discussed, the suppression of speech is clearly involved.

> Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press. The face-off is apparent . . . .[221]

The Court refused to be drawn into a broad pronouncement on whether true statements may ever be subject to civil or criminal liability, but its focus on the facts of the case before it did track the *O'Brien* test.[222] It emphasized that the Georgia law placed sanctions on "pure expression" and not conduct, but in overturning the law the Court confined itself to the facts, stating, "[T]he publication of truthful information available on the public record contains none of the indicia of those limited categories of expression . . . which 'are no essential part of any exposition of ideas . . . .' "[223] The Court left open the way for an inquiry into the possibility that some truthful speech may not be an essential part of the expression of ideas, but it has yet to engage in such an inquiry. It is suggested that if the Court ever upholds a law

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219. Cox Broadcasting Corp. v. Cohn, 231 Ga. 60, 68–69, 200 S.E.2d 127, 134 (1973) (denying motion to rehear).

220. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); Roe v. Wade, 410 U.S. 113 (1973) (abortion).

221. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 489 (1975).

222. *See* note 20 and accompanying text *supra.*

223. 420 U.S. at 495. Justice Rehnquist dissented in *Cohn* on the basis that the subject of the appeal was not a "final judgment," and did not deal with the first amendment issue.

permitting liability for true statements, that law must focus on the *context* in which the statements are made and may not categorically suppress such statements.[224]

SUMMARY AND CONCLUSION

This paper has attempted to show that the clear and present danger standard for speech urging persons to commit unlawful acts and the multi-level approach to speech which itself inflicts harm are aspects of the same concept. The tests reflect the Supreme Court's insistence that government may not attempt to suppress ideas because it disapproves of those ideas. At the same time, government may incidentally impair speech in the fulfillment of any of its legitimate functions. Since a direct test of governmental motivation where speech is impaired would be impossible to administer and could hamstring the government in its ability to engage in legitimate operations, the Court protects against the use of feigned legitimate interests to suppress speech by using tests of necessity; in order to be upheld governmental action impairing speech must be necessary to the accomplishment of legitimate governmental ends. The differences among the members of the Court are on the degree of necessity which must be shown.

This theory of the Court's decisions serves several functions. First, it demonstrates the basis for the differences between the judges. The libertarian judge has a bias toward being certain there is no possibility of suppressing ideas while the more conservative judge wishes to be sure that legitimate governmental interests are vindicated. Further, in different contexts, each judge will perceive the governmental need differently. Second, recognition of the theory permits one to argue that it has been wrongly applied, particularly in the area of unprotected speech where it is most explicitly stated. In outlawing fighting words, the government may seek to suppress ideas of extreme personal hostility; in proscribing obscenity it may seek to suppress ideas about sex; and in allowing libel actions, it may seek to suppress the expression of ideas about persons. Yet in each case the Court's rationale has been that the legislation is aimed at conduct and not ideas.

Finally recognition that free speech decisions of the Court can be harmonized in a single comprehensive theory provides a basis for principled disagreement with the Court. The Court takes the "imperial

224. An example of such a law would be one which prohibits the identification of rape victims, where the victim's identity is not part of the public record of trial, for the sole purpose of inflicting humiliation or suffering. The statement would be punishable only if made vindictively with no intent to further discussion.

perspective,"[225] focusing on the purposes of governmental action. Under such a theory, even if the tests which are its particular manifestation were wholly successful in eliminating all laws which had an improper motivation, some ideas might still be suppressed. This possibility has led some scholars to suggest that the Court use a different perspective — that it focus on what the speaker has said or done and whether that is protectable. Thus, Professor Emerson suggests that the Court distinguish between events which are primarily action and thus unprotected and those which are primarily expression and thus protected.[226] The focus on the speaker's activity rather than the governmental interest might result in less significance being given governmental interests which are now used to justify restrictions on speech. This paper, in identifying the imperial perspective of the Court on the first amendment, provides, it is hoped, a starting point for a dialogue between the two views.

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225. This term, which was the germinal notion for this paper, comes from Cahn, *Law in the Consumer Perspective,* 112 U. PA. L. REV. 1 (1963). The "imperial" perspective focuses on the governmental body and what it is attempting to do. The "consumer" perspective focuses on the effects of law; that is, man's speech is just as impaired if he is silenced from "good" motives as it is if he is silenced from "bad" ones.

226. EMERSON, *supra* note 17 *passim.*